87-469

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

REYNOLDS METALS COMPANY,
ASSOCIATED INDUSTRIES OF ARKANSAS,
RICELAND FOODS, INC., and WEYERHAEUSER COMPANY,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether the restrictions in Section 201 of the Federal Power Act denying the Federal Energy Regulatory Commission ("FERC") jurisdiction over "generation facilities" and "purchases" of wholesale power, which were intended to preserve State regulatory authority over these matters, preclude FERC from acting under Section 206 of the Act to reallocate the costs of expensive nuclear plants by forcing a utility in one State to purchase the generation capacity of such plants built by affiliates in other States when that utility and its affiliates have been part of an integrated system serving several States.

RULE 28.1 STATEMENT

Reynolds Metals Company is the parent of the Eskimo Pie Corp., whose shares are publicly traded. Associated Industries of Arkansas is a trade association whose members need not be listed here. Riceland Foods, Inc. is a group of cooperative enterprises owned and controlled by some 15,000 farmer members located primarily in Arkansas. To the knowledge of counsel, none of the affiliates or subsidiaries of Weyerhaeuser Company has any outstanding securities in the hands of the public.

PARTIES TO THE PROCEEDING

The petitioners herein (Reynolds Metals Company, Associated Industries of Arkansas, Riceland Foods, Inc., and Weyerhaeuser Company) were petitioners in one of the appeals consolidated by the court of appeals.

The respondent in the court of appeals was the Federal Energy Regulatory Commission, which was supported by petitioner-intervenors Louisiana Public Service Commission; Jefferson Parish, Louisiana; City of New Orleans, Louisiana; Occidental Chemical Corporation; Georgia Gulf Corporation; and by intervenors Union Carbide Corporation; Louisiana Power & Light Company; New Orleans Public Service, Inc.; Middle South Energy, Inc.; and Middle South Services, Inc.

Other petitioner-intervenors in the court of appeals were Arkansas Power & Light Company; Arkansas and Missouri Congressional Delegations; Arkansas Public Service Commission; State of Arkansas; Cities of Conway and West Memphis, Arkansas; AMAX, Inc.; Missouri Public Service Commission; Mississippi Public Service Commission; Mississippi Power & Light Company; Representative Webb Franklin; Edwin Lloyd Pittman, Attorney General of the State of Mississippi; Mississippi Legal Services Coalition; Representative Wayne Dowdy; and Mississippi Industries (comprised of Anderson-Tully Co.; Columbus Lumber Co.; Crouse-Hinds Lighting; Great Southern Wirebound Box Co.; Madison Furniture Industries; Chloride, Inc., Automotive Div.; Greenville Mill; Marathon LeTourneau Co.; Perma "R" Products, Inc.; and Cives Steel Co.).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals is reported at 808 F.2d 1525 (App. 1a).[1] The separate opinion of Judge Bork, concurring in part and dissenting in part, is reported at 808 F.2d 1568-69 (App. 94a-96a). On June 24, 1987, the original panel vacated a portion of its earlier decision in an order reported at 822 F.2d 1103 (Supp. App. 14a).

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[1] Appendix references are to the Appendix accompanying the petition for a writ of certiorari in *Arkansas Public Service Comm'n* v. *Federal Energy Regulatory Comm'n*, No. 86-1380 (filed Feb. 20, 1987). Additional references (Supp. App.) are to the attached Supplemental Appendix.

The opinions of the Federal Energy Regulatory Commission (""FERC") and its administrative law judges are listed in the margin.[2]

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1987 (Supp. App. 1a). On April 3, 1987, the full court of appeals granted rehearing *en banc;* on June 24, 1987, the full court vacated its grant of rehearing *en banc* (Supp. App. 12a) and the panel granted rehearing (Supp. App. 14a). By its order of June 24, 1987, the panel vacated the portions of its opinion of January 6, 1987, from which Judge Bork had dissented, reversed in part FERC's prior decisions, and remanded the case to FERC for reconsideration and explanation of certain issues (*id.*).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Part II of the Federal Power Act, 16 U.S.C. §§ 824-824k, is reprinted in full at App. 527a-554a.

Section 201(b)(1) of the Federal Power Act, 16 U.S.C. § 824(b)(1), provides:

> The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of

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[2] *Middle South Energy, Inc. and Middle South Services, Inc.*, 31 FERC (CCH) ¶ 61,305 (1985) (App. 141a); *Middle South Energy, Inc. and Middle South Services, Inc.*, 32 FERC (CCH) ¶ 61,425 (1985) (opinion on rehearing) (App. 97a); *Middle South Services, Inc.*, 30 FERC (CCH) ¶ 63,030 (1985) (ALJ initial decision) (App. 223a); *Middle South Energy, Inc.*, 26 FERC (CCH) ¶ 63,044 (1984) (ALJ initial decision) (App. 374a).

> electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydro-electric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

Section 206(a) of the Federal Power Act, 16 U.S.C. § 824e(a), provides:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

STATEMENT OF THE CASE

The court of appeals held that FERC had jurisdiction under the Federal Power Act to order an Arkansas electric utility—Arkansas Power & Light Company ("AP&L")—to pay for a substantial percentage of the capacity in the grossly uneconomical Grand Gulf No. 1 nuclear plant ("Grand Gulf") built in Mississippi, at a cost of $3 billion, by a separate company owned by the holding-company parent of AP&L. AP&L does not need or want that capacity, and the Arkansas Public Service Commis-

sion ("Arkansas PSC") is opposed to FERC's order requiring AP&L to pay for Grand Gulf capacity when AP&L has not agreed to do so and when the Arkansas PSC has never reviewed any request by AP&L to purchase such capacity.[3]

The MSU System. The Grand Gulf nuclear plant is located in Port Gibson, Mississippi, and is owned by Middle South Energy, Inc. ("MSE"). MSE is a subsidiary of Middle South Utilities, Inc. ("MSU"), which is a registered holding company under the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79 *et seq.*

MSU owns four electric utility operating companies serving four south-central states. These companies are AP&L (serving Arkansas and part of Missouri), Louisiana Power & Light Co. ("LP&L"), New Orleans Public Service, Inc. ("NOPSI") and Mississippi Power & Light Co. ("MP&L"). Each operating company is separately incorporated, has its own board of directors and management, serves a separate geographic area, and has separate generation facilities.

Like many other utilities throughout the nation, the MSU operating companies participate in a power-sharing pool, and seek to coordinate the expansion of their individual generation facilities in order to achieve the greatest economies of scale. The four MSU operating companies sell and exchange capacity and energy among themselves. These transactions have for many years been controlled by some form of "system agreement." Although the system agreements have provided for coor-

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[3] The Arkansas PSC and AP&L have already filed petitions for certiorari seeking review of the court of appeals' decision. *Arkansas Public Service Comm'n* v. *FERC*, No. 86-1380 (filed Feb. 20, 1987); *Arkansas Power & Light Co.* v. *FERC*, No. 86-1424 (filed Mar. 4, 1987). The Missouri Public Service Commission joined in the Arkansas PSC's petition and opposes FERC's decision.

dinated planning of new generation facilities, they have also provided that each operating company is responsible for owning or purchasing generating capacity necessary to meet the requirements of its own customers (App. 182a).

State Regulation. While the four MSU operating companies engage in significant inter-affiliate transactions, each operating company is subject to regulation of its retail rates, generation facilities, and wholesale power purchases by the state regulatory bodies with jurisdiction over its service area. AP&L is no exception, and prior to this case had been subject to rigorous regulation of these matters by the Arkansas PSC.[4]

In exercising its regulatory powers over AP&L, the Arkansas PSC had succeeded in its duty of assuring that Arkansas ratepayers would be provided with both economical and adequate supplies of electric energy. For example, in 1974 and 1980 respectively, AP&L brought on line nuclear facilities—Arkansas Nuclear One 1 ("ANO-1") and Arkansas Nuclear One 2 ("ANO-2")—at an overall cost of approximately $500 per kilowatt, and those plants are able to produce economical power (App.

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[4] The Arkansas PSC may disallow any retail rates for the sale of electric power subject to its jurisdiction that it finds to be unreasonable, Ark. Stat. Ann. § 73-204(a), and has broad powers to review actions by utilities that have or may affect retail rates for electric power. In particular, public utilities in Arkansas —including AP&L —are required to apply to the Arkansas PSC for approval of the construction of generation facilities, Ark. Stat. Ann. §§ 73-276.1 *et seq.*, and for the purchase, sale, lease or rent of any utility property constituting an operating system or unit. Ark. Stat. Ann. § 73-253(a)(3).

Similar regulatory requirements exist under Missouri law, *see* Mo. Rev. Stat. §§ 393.170, 393.190, 393.200, and are implemented by the Missouri Public Service Commission with respect to AP&L's operations in Missouri.

14a). The construction of these and other plants—which were built by AP&L only after the Arkansas PSC had certificated the need for such plants—has provided AP&L with more than sufficient base load capacity to meet the demand of its customers for the foreseeable future.

Grand Gulf Cost Overruns. Like many other nuclear plants built in recent years, huge cost overruns were incurred in constructing Grand Gulf. When construction began in 1974, the projected cost of Grand Gulf was $1.2 billion for two 1250 megawatt generating units (or about $500 per kilowatt) (App. 14a). This projection proved to be terribly mistaken. By the time Grand Gulf came on line in July 1985, delays due to a variety of factors, coupled with inflation, had driven Grand Gulf's costs to more than $3 billion for only *one* of the two planned units (App. 14a).[5] As a consequence, Grand Gulf is among the most expensive power sources on the MSU system. The Arkansas PSC, of course, never approved the construction of Grand Gulf.

The MSU Agreements. In 1982, several years before Grand Gulf came on line, two agreements were filed with FERC. The System Agreement specified the general terms and conditions under which the MSU operating companies would exchange capacity and energy. The Unit Power Sales Agreement ("UPSA"), which resulted from negotiations and agreements among the operating companies and MSE in the preceding years,[6] established the

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[5] Construction of the second unit, Grand Gulf No. 2, has been halted (App. 16a n.22).

[6] The precursors of UPSA were a July 1980 "Memorandum of Understanding" and a July 1981 "Reallocation Agreement," both of which freed AP&L of all responsibility for Grand Gulf (App. 18a). In November 1981, the Securities and Exchange Commission approved the Reallocation Agreement pursuant to Section 12(f) of the Public

companies' respective cost responsibility for the Grand Gulf plant. The UPSA, executed by all the MSU operating companies, allocated Grand Gulf's generation capacity and construction costs as follows:

Utility	Contractually Agreed Share of Grand Gulf Capacity
LP&L	38.57%
MP&L	31.63%
NOPSI	29.80%
AP&L	0%

The parties, including AP&L, thus agreed in UPSA (as they had agreed previously) that AP&L had no contractual responsibility to pay for *any* share of Grand Gulf's capacity and costs. AP&L was the first operating company to invest in nuclear power and by 1980 had brought on line two nuclear plants (AN0-1 and AN0-2). By the time negotiations had produced UPSA, AP&L was also building several new coal-fired power plants (also certificated by the Arkansas PSC on the basis of need in Arkansas) and thus had adequate base load capacity (App. 395a). AP&L therefore could not effectively use the additional power available from Grand Gulf, but the other MSU operating companies determined in UPSA to purchase Grand Gulf power because they believed at that time that it would provide an economic alternative to other modes of generation.

The FERC Proceedings. FERC recognized that its review of the two agreements presented "some extremely difficult and controversial cost allocation issues which have no easy answers" (App. 145a). After proceedings

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Utility Holding Company Act, 15 U.S.C. § 79*l*(f). *Middle South Energy, Inc.*, 23 SEC Dock. 1595, 1596 (Nov. 18, 1981) (Rel. No. 22280).

before two administrative law judges, FERC determined, over the strenuous objections of Arkansas, Missouri, and Mississippi governmental parties, that it had jurisdiction under the Federal Power Act to abrogate the agreements and "reallocate" Grand Gulf's capacity among the four MSU operating companies, and specifically to require AP&L to become a purchaser of that plant's capacity (App. 167a-69a, 216a).

FERC then proceeded to mandate revisions to UPSA that would reallocate Grand Gulf's capacity in a manner intended to spread among the four operating companies, in proportion to their individual share of the MSU system's total demand, the investment costs of *all* nuclear plants anywhere on the MSU system (App. 22a). These included ANO-1 and ANO-2, Grand Gulf, and a Louisiana plant then being completed by LP&L (Waterford 3). Because AP&L had built its two Arkansas nuclear plants relatively cheaply, FERC's reallocation shifted to AP&L the *largest* share of Grand Gulf capacity, as shown below:

Utility	Contractually Agreed Share of Grand Gulf Capacity and Energy	FERC "Reallocation" of Grand Gulf Capacity
LP&L	38.57%	14%
MP&L	31.63%	33%
NOPSI	29.80%	17%
AP&L	0%	36%

In determining that it had jurisdiction under the Federal Power Act to force AP&L to become a purchaser of Grand Gulf capacity, FERC relied on its general jurisdiction under Section 201(b)(1) to regulate the "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). Although Section 201(b)(1) also states that FERC shall not have jurisdiction, except as specifi-

cally provided, "over facilities used for the generation of electric energy," FERC concluded that this limitation did not apply because electricity generated at the Grand Gulf plant was to be "used for interstate wholesale sales" (App. 106a). FERC emphasized the highly integrated nature of the MSU system, though it acknowledged that the system was not a "monolith" and that the individual operating companies had some autonomy in system decision-making (App. 119a).

FERC also rejected arguments that its order would unlawfully "force" AP&L to purchase Grand Gulf capacity. It concluded instead that FERC's remedial powers under Section 206 of the Federal Power Act authorized it to order AP&L to pay for a share of Grand Gulf because the contracts entered into by the MSU operating companies "affected" rates for the sale of wholesale power. In FERC's view, its actions were not to be characterized as requiring a "forced purchase," but rather as implementing an "appropriate allocation" of costs among the affiliated MSU operating companies (App. 111a, 169a).

The Court of Appeals Decision. The court of appeals affirmed FERC's jurisdictional decision (App. 32a-39a).[7] Because Grand Gulf and other generating facilities "had been built and planned on a profoundly integrated basis," the court held that FERC "properly may examine [generation capacity] allocation as a cost component affecting wholesale rates" (App. 33a). The court accordingly believed that MSU's historical coordination of the capacity additions of the individual operating companies gave FERC sweeping authority to shift generation costs among the companies.

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[7] The court of appeals' jurisdiction was based on 16 U.S.C. § 825*l*(b).

In its original decision, the court also affirmed FERC's specific "reallocation" of Grand Gulf costs among the MSU operating companies.[8] However, the court subsequently decided to remand the case to FERC for reconsideration of the "reallocation" that it chose and for an explanation of why FERC's decision was not itself "unduly discriminatory" insofar as the agency did not go further in equalizing nuclear capacity costs, or, alternatively, in equalizing the cost of all nuclear *and* coal units built by MSU entities (Supp. App. 14a-15a). FERC has not yet issued any decision upon reconsideration, but has invited comment on how it should proceed (Supp. App. 16a).

REASONS FOR GRANTING THE WRIT

This is a case of enormous importance. AP&L has been ordered to absorb a substantial portion of the $3 billion incurred in bringing Grand Gulf on line. There are five million consumers of electric power served by the MSU operating companies in the States of Arkansas, Louisiana, Mississippi and Missouri. Each will be significantly affected by the lower court's interpretation of the Federal Power Act. In Arkansas, the impact promises to be devastating. Households in Arkansas will experience skyrocketing electric bills and businesses critical to Arkansas' economy, especially those that are energy-

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[8] Judge Bork, dissenting from this part of the court's decision, argued that FERC had not adequately explained why its remedy permitted the continuation of large disparities in the MSU operating companies' nuclear capacity costs, with AP&L continuing to bear the lowest costs on an average per-kilowatt basis (App. 94a). The full court of appeals granted rehearing *en banc* to consider the issues raised in Judge Bork's dissent (Supp. App. 9a), but that rehearing order was later vacated when the original panel agreed to rehear those issues and adopted Judge Bork's reasoning (Supp. App. 12a).

intensive, will suffer enormously.[9] Future industrial development throughout the region will necessarily be substantially influenced by the allocation of Grand Gulf's extraordinary costs.

All of this has been required by FERC's misinterpretation of what was designed as a consumer protection statute, a fact scarcely mentioned in the opinion of the court of appeals upholding FERC's jurisdiction. Although Congress decided in the Federal Power Act that consumers would best be served by State regulation, supplemented only where necessary by federal agency control, the decision in this case sustains a broad and unprecedented view of federal authority. Regional regulation, which is what Congress rejected but the court of appeals sanctioned, necessarily means federal regulation; and federal regulation necessarily means that the States have no control.

FERC's "reallocation" order has already led to a great deal of litigation and controversy. *See* note 33, *infra*. Indeed, there is now before the Court an appeal from the decision of the Mississippi Supreme Court denying MP&L an increase in its retail rates until the prudency of Grand Gulf's costs is first determined by Mississippi state regulators. *Mississippi Power & Light Co.* v. *State of*

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[9] For example, petitioner Riceland Foods is a farmer-owned cooperative with approximately 15,000 members. It handles between 30 and 50 percent of Arkansas' soybean crop and 45 to 60 percent of the state's rice crop. As recognized in the FERC proceedings, farmers in Arkansas will be affected in two ways by FERC's reallocation of Grand Gulf costs: first, there will be higher irrigation, grain drying and storage costs on the farm itself, and second, there will be higher processing costs at Riceland Foods' plants. Riceland Foods' operations are energy-intensive, and cost increases resulting from higher electric-power rates will have to be absorbed by farmers since the added costs cannot be easily passed along in the price-competitive international market for farm goods (App. 331a).

Mississippi, No. 86-1970 (jurisd. statement filed June 8, 1987). The controversy in that case relates to the same FERC order directing AP&L to pay for Grand Gulf capacity, and it would be appropriate to consider the two cases together in light of their common factual basis and the related issues of federal and state jurisdiction.

The questions presented here are far-reaching and are bound to recur. Integration and coordination among utilities is commonplace.[10] By relying on the integrated nature of the four operating companies comprising Middle South Utilities, FERC and the court below have swept within their rulings the potential to "reallocate" more than half of the entire nation's generating capacity. The controversy centers on who should pay for costly nuclear plants in Mississippi and Louisiana, but this too is a circumstance that is far from unique to this case.[11]

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[10] There are nine registered public utility holding companies with electric utility subsidiaries, and those subsidiaries serve over 20 states. SEC Office of Public Utility Regulation, *Financial and Corporate Report Registered Public Utility Holding Company Systems* (March 31, 1986). Formal electric utility power-pooling arrangements are also prevalent throughout the country. When FERC last studied the subject, it identified formal pools of "12 corporately unaffiliated groups, representing 44 percent of the national generating capacity, plus the five holding company pools representing about 15 percent." FERC, *Power Pooling in the United States* 9 (1981).

[11] The extensive record of nuclear power plant cancellations and cost overruns was noted in the FERC proceedings (App. 256a), and the particular case of the costly Wolf Creek nuclear plant in Kansas has already come to the Court's attention in an appeal that was subsequently withdrawn. *Kansas Gas & Electric Co.* v. *State Corporation Comm'n*, 239 Kan. 483, 720 P.2d 1063 (1986), *appeal dismissed*, 56 U.S.L.W. 3017 (1987). One leading business journal has written that "[t]he failure of the U.S. nuclear power program ranks as the largest managerial disaster in business history," and counted 28 plants cancelled between 1978 and 1985 after construction had begun. James Cook, "Nuclear Follies," *Forbes* 1, 82 (Feb. 1985).

Having said all this, petitioners recognize that the decision below concerns matters of some complexity and that the opinions of the court of appeals and of FERC are quite lengthy. The question presented here, however, is straightforward and, more important, fundamental to the proper allocation of State and federal jurisdiction under the Federal Power Act. The underlying issues have been considered by this Court in related contexts. As we discuss, the court of appeals has rendered an interpretation of the Act at odds with those decisions of the Court and, in the process, has misconstrued the Court's recent decision in *Nantahala Power & Light Co. v. Thornburg*, 106 S. Ct. 2349 (1986).

A.

Electric power is a staple ingredient of modern industry and society. Because electric utilities are natural monopolies and because electric power is "a product used in virtually every commercial and manufacturing facility," *FERC* v. *Mississippi*, 456 U.S. 742, 757 (1982), no State can effectively promote industrial development, protect its citizens from excessive power costs, and plan for the future unless it can closely regulate those utilities.

States accomplish these ends by requiring utilities to obtain prior approval before constructing a generation facility and by determining whether the utility has been prudent in constructing the plant, in purchasing power at wholesale and in incurring other expenses. Some states also review in advance utilities' power-purchase and other operating plans.[12] As the Court observed, this "regulation of utilities is one of the most important of the functions traditionally associated with the police power of the

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[12] *See* American Bar Ass'n, *The Need for Power and the Choice of Technologies: State Decisions on Electric Power Facilities* (June 1981) (surveying state regulation of electric utilities).

States." *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Commission*, 461 U.S. 375, 377 (1983).

Part II of the Federal Power Act (16 U.S.C. §§ 824-824k) therefore established a *dual* system of State and federal jurisdiction in which the States are to have the preeminent role, to be "supplemented" by federal regulation of rates for the interstate transmission and the sale of power at wholesale.[13] The Act was "'conceived entirely as a supplement to, and not as a substitute for, State regulation.'" *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515, 525 (1945). Section 201(a) firmly declares that "Federal regulation [is] to extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a).

Congress implemented this principle in the only way possible—by carefully confining federal regulatory jurisdiction. Under Section 201(b)(1) of the Act, 16 U.S.C. § 824(b)(1), FERC's authority is limited to exercising jurisdiction over facilities for "the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce . . .." Within Section 201(b)(1)'s grant of jurisdiction there are two important restrictions.

As to the first, Congress made its intention clear by adding to Section 201(b)(1) the following language: "The

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[13] It is familiar history that Part II of the Federal Power Act was:

> a "direct result" of this Court's holding in Public Utilities Commission v. Attleboro Steam & Electric Co., [273 U.S. 83 (1927)], that the states lacked power to regulate the rates governing interstate sales of electricity for resale. . . . Part II of the Act was intended to "fill the gap" created by Attleboro by establishing exclusive federal jurisdiction over such sales.

New England Power Co. v. *New Hampshire*, 455 U.S. 331, 340 (1982). Congress intended that the legislation "tak[e] no authority from State commissions." H.R. Rep. No. 1318, 74th Cong., 1st Sess. 8 (1935).

Commission . . . shall not have jurisdiction . . . over facilities used for the *generation of electric energy* or over facilities used in local distribution," except as "specifically provided" elsewhere in the Act. As this Court has recognized, Congress was here "trying to reconcile the claims of Federal and of local authorities and to apportion Federal and state jurisdiction over the industry." *Connecticut Light & Power, supra*, 324 U.S. at 531. By enacting this "generation facility" restriction, Congress expressly rejected the Senate's original view that federal jurisdiction over generation facilities was needed "to secure the planned coordination of this industry on a regional scale." S. Rep. No. 621, 74th Cong., 1st Sess. 48 (1935).

The term "sale" in Section 201(b)(1) is a further restriction on federal authority, representing an important aspect of the Act's division of jurisdiction between State and federal regulators. FERC has jurisdiction to regulate only "sales of power at wholesale and not purchases."[14] FERC therefore cannot force utilities to purchase power. As we have discussed, that has been a matter for the States to control. Indeed, as recently as *Nantahala Power & Light Co.* v. *Thornburg*, 106 S. Ct. 2349, 2360 (1986), this Court assumed, although without deciding, that regulating "the particular *quantity* of power procured by a utility from a particular source"—in other words, regulating the "purchase"—was a matter for State agencies.

In this case, far from engaging in any such assumption, the court of appeals rejected it. In the court's view, the

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[14] *Wisconsin Michigan Power Co.*, 31 F.P.C. 1445, 1451 (1964). *See also*, with respect to FERC's lack of power to force purchases, *Otter Tail Power Co.* v. *Federal Power Commission*, 473 F.2d 1253, 1258 (8th Cir. 1973) (citing the "statutory prohibition against the forced enlargement of generating facilities"); *Southern Company Services, Inc.*, 20 FERC (CCH) ¶61,332, at 61,694 (1982).

federal agency, not the States, had exclusive jurisdiction to determine whether and to what extent AP&L (and the other MSU operating companies) must purchase Grand Gulf power. Under the terms of UPSA, AP&L was not a purchaser of Grand Gulf power; the only purchasers set forth in the agreement were LP&L, MP&L and NOPSI.[15] Under the terms of FERC's order, however, AP&L too was forced to become such a purchaser (App. 216a), and the court sustained FERC's authority, on the basis of what it described as "solid" case law (App. 45a), to adjust the percentages among the four companies accordingly.

With respect to the "generation facility" restriction, the court of appeals acknowledged that FERC's reallocation of the costs of Grand Gulf "does, to some extent, result in the 'regulation of matters relating to generation'" (App. 40a). The court thought, however, that FERC had not exceeded its jurisdiction because the Section 201(b)(1) "but" clause allows FERC to regulate generation facilities when another provision of the Act "specifically" so provides (App. 41a).

Petitioners submit that the court erred in its failure to enforce both of these restrictions on federal regulation.

B.

1. In refusing to confine FERC's jurisdiction in light of the forced purchase and generation facilities restrictions in the Act, the court of appeals relied on Section 206, which provides that if FERC, after a hearing, determines that:

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[15] These three purchasers expressed their entitlements to Grand Gulf power as percentages because, at the time UPSA was signed, they did not know how many megawatts of capacity from Grand Gulf would eventually become available (App. 383a-384a).

> any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. 16 U.S.C. 824e(a).

The court concluded that UPSA was a "contract affecting" a "transmission or sale subject to the jurisdiction of the Commission" within the meaning of Section 206. Its reasoning was simple and consisted of four propositions. First, UPSA distributed Grand Gulf capacity "among the MSU operating companies" (App. 34a), and thereby allocated capacity costs of Grand Gulf among those utilities. Second, "[c]apacity costs are a large component of wholesale rates" (App. 35a). Third, UPSA thus "plainly" affects the wholesale rates "at which the operating companies exchange energy" (*id.*).[16] Fourth, having detected purportedly unreasonable "disparities" in capacity costs among those companies, the Commission therefore had jurisdiction to "require remedial action" pursuant to Section 206 (*id.*).[17]

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[16] UPSA, in fact, did not determine the rates for wholesale power transactions between AP&L, MP&L, LP&L, and NOPSI, but rather determined only the share of Grand Gulf's capacity and costs to be allocated to the operating companies purchasing from MSE.

[17] In this case, FERC adopted the novel doctrine that it is "discriminatory," within the meaning of Section 206 of the Federal Power Act, for one electric utility to have different generation costs from other (affiliated or unaffiliated) utilities participating in a power-pooling arrangement. In the past, the Federal Power Commission rejected the proposition that it should equalize generation costs among affiliated operating companies, reasoning that such equalization would improperly entail subsidization of one utility's ratepayers by the ratepayers of other utilities. *Georgia Power Co.*, 52 F.P.C. 1343, 1350 (1974).

However, UPSA did *not*, as the court stated at the outset, distribute Grand Gulf capacity "among the MSU companies." Indeed, the fact UPSA did not do this was the basis of FERC's objections: AP&L was to take none of Grand Gulf's capacity and energy; there were three purchasers but AP&L was not one of them. In the language of Section 201(b), quoted above, there was no "sale of [Grand Gulf] electric energy at wholesale in interstate commerce" to AP&L. Capacity costs may well be a large component of wholesale rates, as the court next stated, but the capacity costs of Grand Gulf were not a component of AP&L's wholesale rates until FERC ordered them to become such.

The court below also erred in construing FERC's remedial authority under Section 206. A contract may be found to affect wholesale rates, but it does not necessarily follow, as the court of appeals believed, that FERC has plenary jurisdiction to reject that contract and replace it with what FERC believes would be just and reasonable. This Court so held in *Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271 (1976).

Conway determined that even if "a rule, regulation, practice, or contract" within the meaning of Section 206 was one "affecting" a wholesale rate, it *did not* follow that FERC had jurisdiction to revise such "rule, regulation, practice, or contract." That is, under Section 206 the "rules, practices, or contracts 'affecting' the jurisdictional rate are not themselves limited to the jurisdictional context." 426 U.S. at 281. FERC has authority to consider such practices and contracts; *Conway* so held. But FERC must not cross over its jurisdictional boundary in order to regulate the contract or practice. FERC cannot, in short, impose a remedy that "invade[s] a nonjurisdictional area." 426 U.S. at 279. That is the meaning of Section 206 and it is a meaning at odds with the view of the court of appeals

in this case, which sustained FERC's jurisdiction to force AP&L to become a purchaser of Grand Gulf power.[18]

To adopt the logic of the court of appeals is, as *Conway* recognized, to ignore the Federal Power Act's purpose to confine federal jurisdiction and thereby ensure that traditional State authority is not ousted. It is difficult to conceive of any contract entered into by any one or a group of operating companies, among themselves or with others, that would not "affect" wholesale rates under the lower court's interpretation of Section 206. The contracts involved in building a power plant surely fit that description, yet no one would suppose that FERC therefore had jurisdiction to become a construction supervisor, or more to the point, to revise such contracts.

Until this case, there also would have been no doubt that AP&L's decisions whether to become an owner or to pay for some or all of the cost of a power plant constructed in Arkansas or outside the State were not matters under FERC's jurisdiction or control. Not very long ago, this Court was confident that the "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States." *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 205 (1983). And as we have indicated above, this Court assumed in *Nantahala* that the quantity of power purchased by a utility from a particular source was for the State to regulate.

The court of appeals misconstrued *Nantahala* when it sought to support its ruling by invoking that decision. *Nantahala* decided only that a State regulatory body

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[18] As we discuss below, the States are capable of effectively regulating the allocation of the capacity of a generating plant intended to supply power to utilities in several States. *See* p. 27, infra.

setting retail rates may not engage in a collateral attack on a FERC decision that had set wholesale rates. The case did not present the question whether FERC had kept within the bounds set in the Federal Power Act when it rejected an apportionment of low-cost power between Nantahala and an affiliated utility and required Nantahala to file revised rates. *Nantahala* reached this Court on appeal from a State court, which had upheld a State commission's ruling that required an apportionment different from that demanded by FERC's earlier order. Relying on the filed-rate doctrine,[19] the Court held that the State regulators had to track in their rate calculations the FERC adjustments to the Nantahala-Tapoco-TVA coordination and apportionment agreements. The validity of FERC's remedy, however, was not before the Court, as the Court made clear at the outset of its opinion.[20]

In the context of judicial review of a FERC order, *Nantahala* does not represent a "clear and timely message that FERC's jurisdiction" to reallocate Grand Gulf capacity under Section 206 is "unquestionable," as the court of appeals believed (App. 38a). The message of *Nantahala* is that challenges to FERC orders setting wholesale rates cannot be made in State regulatory commissions, but must be made directly in the federal

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[19] The filed-rate doctrine ensures that sellers of wholesale power governed by FERC can recover the costs incurred by their payment of just and reasonable FERC-set rates. When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate.

Nantahala, 106 S. Ct. at 2359.

[20] *See* 106 S. Ct. at 2353 ("FERC's decision has a direct bearing on this case, but the decision before us is an opinion of the North Carolina Supreme Court that affirmed a [Utilities Commission of North Carolina] order.").

courts of appeals and, ultimately, this Court, which is why this petition has been filed.[21]

2. As we have discussed, Section 201(b)(1) of the Federal Power Act denies FERC jurisdiction "over facilities used for the generation of electric energy," and instead leaves to each State jurisdiction over the manner in which utilities serving the State will satisfy their power needs through generation facilities. FERC's order emasculated the Arkansas PSC's control over AP&L's generation facilities. The construction and prudency of the Grand Gulf plant were never reviewed by the Arkansas PSC and the facility was not needed to satisfy AP&L's load. By foisting a sizeable share of the Grand Gulf generation plant on AP&L through cost "equalization," AP&L must necessarily share with utilities in other states the advantages of the economical power from its own Arkansas plants, even though the Arkansas PSC certificated the construction of those plants in order to meet Arkansas' needs (App. 106a).

Although, as we have indicated, the court of appeals acknowledged that FERC's allocation of Grand Gulf's

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[21] At all events, the Court in *Nantahala* did not even refer to Section 206. The generation facility restriction was not at issue and no question of forced purchase was involved because in that case FERC did not compel any utility to increase the total amount of energy or capacity purchased, a matter the Court assumed was within the authority of the State. Indeed, in discussing its own decision in that case, FERC concluded that "*Nantahala* is not directly on point" (App. 169a) and that the "facts of *Nantahala* are clearly distinguishable from those here" (App. 125a). Moreover, in an August 1987 rulemaking proceeding involving regulation of natural gas pipelines, FERC acknowledged that the Court's *Nantahala* decision does not preclude state regulators from reviewing the prudency of natural gas purchasing decisions made by local distribution companies, whose rates are exclusively set by the states. *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 52 Fed. Reg. 30,334, 30,344 (Aug. 14, 1987) (interim rule and statement of policy).

capacity does regulate generation, the court stressed that the "generation facility" restriction contains a proviso stating: "except as specifically provided" in other sections of the Act (App. 39a-40a). Therefore, the court held that the generation facility restriction does not apply "where generation facilities are used for interstate wholesale sales" (App. 41a.)

This reading of the Act is not viable on its face. Because Section 201(b)(1) provides that FERC's jurisdiction shall not extend to any sale of energy other than an interstate sale at wholesale,[22] the "generation facility" exception would be entirely superfluous if it did not apply to facilities that produce power sold in interstate commerce at wholesale. As we have also discussed, *Conway* holds that FERC may not, under Section 206, devise a remedy that invades a nonjurisdictional area. Moreover, the "exceptions" to the "generation facility" restriction actually stated in the Act have nothing to do with this case.[23]

This Court has previously rejected an attempt, based on the same reasoning used by the court below, to circumvent the specific restrictions on FERC's jurisdiction contained in Section 201(b)(1). In *Connecticut Light & Power, supra*, the Court barred the Federal Power Commission

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[22] Section 201(b)(1) states, in pertinent part, that

"[t]he provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce . . . *but . . . shall not apply to any other sale of electric energy . . .*." 16 U.S.C. § 824(b)(1) (emphasis added).

[23] The provisions of the Federal Power Act giving FERC limited jurisdiction over generation facilities include: § 202(a), concerning the division of the United States into districts for the voluntary coordination of facilities (16 U.S.C. § 824a(a)); and § 202(c), concerning the authority to order temporary connection of facilities and such generation, delivery, interchange or transmission necessary to meet emergencies (16 U.S.C. § 824a(c)).

(FERC's predecessor) from exercising jurisdiction over a "local distribution facility" carrying out-of-state energy, holding that Section 201(b)(1)'s express limitation on federal jurisdiction over such facilities (which immediately follows the "generation facility" exception) applies even when such facilities "carry no energy except extra-state energy." 324 U.S. at 531. Any other result, the Court stated, "would nullify the exemption and as a practical matter would transfer to Federal jurisdiction the regulation of many local companies that we think Congress intended to leave in state control."[24] *Id.*

Connecticut Light & Power fully applies here. FERC cannot ignore the constraints on its jurisdiction over "generation facilities" simply because a facility's output is transmitted or sold in interstate commerce. Such a step conflicts with the manner chosen by Congress "to apportion Federal and state jurisdiction over the industry."[25] 324 U.S. at 531.

3. The court of appeals thought that the Federal Power Act's restrictions on FERC's jurisdiction did not apply in this case because Grand Gulf had been "built and planned on a profoundly integrated basis" and had been intended to serve several states (App. 33a). The court was mistaken.

The Federal Power Act cannot be approached like the Commerce Clause of the Constitution, with a court con-

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[24] With respect to the possible effect on interstate commerce of its ruling, the Court in *Connecticut Light & Power* explained that Congress "sometimes is moved to respect state rights and local institutions even when some degree of efficiency of a Federal plan is thereby sacrificed" and that it had done so in the Federal Power Act. 324 U.S. at 530.

[25] The only support cited by the court of appeals for its contrary position is a footnote in *Connecticut Light & Power* that described a holding in a lower court decision. 324 U.S. at 528 n.6 (App. 43a).

struing federal authority to apply broadly to all matters affecting interstate commerce, leaving only what remains to exclusive State control. Congress took the opposite approach. Thus, in restricting FERC jurisdiction over generation facilities, Congress rejected the view that federal jurisdiction over such facilities was needed "to secure the planned coordination of this industry on a regional scale." S. Rep. No. 621, 74th Cong., 1st Sess. 48 (1935). Similarly, Congress deliberately withheld from FERC plenary jurisdiction to require the interconnection of electric utilities serving several States, but rather adopted a policy, stated in Section 202(a) of the Act, 16 U.S.C. § 824a(a), of encouraging *voluntary* interconnection on a regional basis.

By limiting FERC's power over "integrated" utilities operating on a regional basis, Congress sought to respect the States' substantial interest in controlling the generation and wholesale power purchases of such utilities, which today account for more than half of the nation's generating capacity. *See* note 10, *supra*. While the activities of "integrated" utilities that operate across a multi-state region may affect federal interests in various ways, the Court has made clear that federal regulatory authority is bounded even in such cases by Congress' determination that State authority over particular matters of vital State concern is best accommodated rather than preempted. The Court firmly stated that principle in *Connecticut Light & Power* more than forty years ago (*see* p. 22, *supra*), and recently applied it again in *Louisiana Public Service Commission v. FCC*, 106 S. Ct. 1890 (1986). Construing the Communications Act of 1934 in *Louisiana PSC*, the Court held that "a federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority."[26]

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[26] In *Louisiana PSC*, the Court considered an attempt by the Federal Communications Commission ("FCC") to preempt State

106 S. Ct. at 1901.

When Congress did specifically address the subject of "integrated" utilities under common control—in the Public Utility Holding Company Act of 1935 ("PUHCA")—it sought to preserve effective State regulation of the utilities' retail rates, not radically to diminish it as FERC has sought to do here.[27] Thus, the courts have recognized that "[t]he purpose of the Public Utility Holding Company Act, as shown by its legislative history, was to supplement state regulation—not to supplant it." *Alabama Electric Cooperative, Inc.* v. *SEC*, 353 F.2d 905, 907 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 968 (1966).[28]

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authority over depreciation rates for intrastate telephone service on the grounds that state-prescribed depreciation rates might interfere with the smooth operation of the FCC-regulated interstate communications network. The Court struck down the FCC's action, noting that the Communications Act of 1934 established a dual system of federal and State regulation that specifically "fences off from FCC reach or regulation intrastate matters." 106 S. Ct. at 1899. In the face of this statutory limitation on FCC jurisdiction, the Court held that it "simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy." 106 S. Ct. at 1901.

[27] Congress enacted PUHCA, 15 U.S.C. §§ 79 *et seq.*, as part of the same legislation containing Part II of the Federal Power Act. *See* 49 Stat. 803 (1935). PUHCA increased the jurisdiction of the Securities and Exchange Commission ("SEC") over public utility securities, and authorized the SEC to require the simplification of the structure of public-utility holding-company systems so that their retail rates could be regulated effectively by the various states. As one leading commentator explains, PUHCA's "fundamental purpose was to free operating companies from absentee landlordism so as to facilitate state regulation." L. Loss, *Securities Regulation* 157 (1961).

[28] One of the primary tasks of the SEC under PUHCA is the limitation of the operations of a holding company to that of a single integrated public utility system, 15 U.S.C. § 79k(b)(1), which system is "not so large . . . as to impair the advantages of *localized* management, efficient operations, or the effectiveness of regulation." 15

The court of appeals mistakenly thought that *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414 (1952), provided a "solid foundation" for FERC's authority to order a purchase of power when such an order "is consistent with the historical integration of a power pool or network" (App. 45a). The Court there held that a rate-reduction order of the Federal Power Commission could not be collaterally attacked on the basis that the rates were originally established through a contract later determined to violate the antitrust laws. 343 U.S. at 423-24.

Neither the "forced purchase" restriction nor the "generation facility" restriction was even discussed by the Commission or the Court in *Pennsylvania Water*, and for good reason. In that case, the Commission had set wholesale rates in an earlier order on the basis of voluntary contractual arrangements between a Pennsylvania utility and a Maryland utility. When the Pennsylvania utility unilaterally sought to terminate those arrangements, the Commission merely required it to continue receiving and selling power, pursuant to the *existing* Commission rate-schedule, until such time as the Pennsylvania utility properly filed a proposed change to the rate-schedule.[29] The

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U.S.C. § 79b(a)(29)(A) (emphasis added). The legislative history explains Congress' view that an operating system "whose management is confined . . . to . . . the service of one regional community is likely to . . . be amenable to local regulation . . . and more often to get along with the public to mutual advantage." S. Rep. No. 621, 74th Cong., 1st Sess. 12 (1935).

[29] Once the Commission's earlier order had gone into effect, it was the order —not the contract —that controlled and the Court so held. 343 U.S. at 422. When the Pennsylvania utility sought to terminate the contracts by "*ex parte* action" it thus sought to invalidate the Commission's order which (like its own contracts) had required it to buy, sell and transmit power. 343 U.S. at 421. *See In re Pennsylvania Water & Power Co.*, 8 F.P.C. 170, 177 (1949), *aff'd*, *Pennsylvania Water & Power Co.* v. *Pennsylvania Public Utilities Comm'n*, 193

Commission did not impose an entirely new capacity-purchase obligation on a utility, as FERC has sought to do here. In short, *Pennsylvania Water* represents at most a decision upholding the jurisdiction of the Federal Power Commission to require compliance with its outstanding orders.[30]

Finally, the continuation of the States' longstanding regulatory control over the quantity of wholesale purchases made by a utility within the State from out-of-state affiliates is entirely workable, and need not lead—as the court below feared—to irreconcilable, "parochial" actions by the various States (App. 51a-53a). Section 209 of the Federal Power Act specifies procedures by which FERC and State commissions can coordinate and jointly address problems relating to their respective jurisdictions. 16 U.S.C. § 824h. In addition, each State is fully able to require that any utility serving the State secure its formal approval before contracting to purchase any particular quantity of wholesale power from an out-of-state generation facility.[31] Any subsequent attempt by a State to void

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F.2d 230 (D.C. Cir. 1951), *aff'd*, 343 U.S. 414 (1952). The Commission decided, and the Court agreed, that the Pennsylvania utility could later terminate these practices *only* by filing under Section 205 of the Federal Power Act, 16 U.S.C. § 824d, and that the Commission had authority under Section 206 to require that the practices required in its order continue until such filing. 343 U.S. at 422.

[30] *Pennsylvania Water* thus cannot be relied upon, as the court of appeals thought, for the proposition that FERC has jurisdiction to force a utility to purchase power when —as here —it had not voluntarily contracted to do so and when FERC had not already issued an order incorporating all or part of the practices embodied in such a contract.

[31] In fact, the Arkansas PSC has determined that AP&L failed to obtain necessary regulatory approvals before entering into agreements with MSE and others relating to the allocation of Grand Gulf capacity and energy. *Middle South Energy, Inc.* v. *Arkansas Public Service Comm'n*, 772 F.2d 404, 408-09, 412-13 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 884 (1986).

that quantity-purchase obligation could then be challenged as an unconstitutional "taking" prohibited by the Due Process Clause. No infringement of FERC's paramount authority to set wholesale *rates* for interstate transactions would arise, and each State would simply have the right to regulate the *quantity* or choice of wholesale power to be purchased by the utility serving that State at the FERC-approved rate.[32]

C.

This case has already produced a clash of federal and State authority respecting each of the four MSU operating companies affected by FERC's "reallocation" of Grand Gulf capacity. The Court now has before it an appeal from a decision of the Mississippi Supreme Court denying MP&L an increase in its retail rates, in an amount corresponding to FERC's "reallocation" of Grand Gulf costs to MP&L, until the Mississippi Public Service Commission determines the "prudence" of the cost obligations incurred by MP&L. *Mississippi Power & Light Co. v. State of Mississippi*, No. 86-1970.[33]

If we are correct that FERC exceeded its jurisdiction in "reallocating" Grand Gulf capacity to AP&L, the

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[32] *See, e.g., Appeal of Sinclair Machine Products, Inc.*, 126 N.H. 822, 498 A.2d 696 (1985); *Pike County Light & Power Co.* v. *Pennsylvania Public Utilities Comm'n*, 465 A.2d 735 (Pa. Cmwlth. 1983).

[33] In addition to the Mississippi state proceedings involved in *Mississippi Power & Light Co.*, concerning MP&L, the right of each of the other MSU operating companies to pass through its share of the FERC-allocated Grand Gulf costs has been challenged in state proceedings. *See Middle South Energy, Inc.* v. *Arkansas Public Service Comm'n, supra* (AP&L); *New Orleans Public Service, Inc.* v. *City of New Orleans*, 782 F.2d 1236 (5th Cir. 1986), *later op.*, 798 F.2d 858, *cert. denied*, 107 S. Ct. 1910 (1987) (NOPSI); *Louisiana Power & Light Co.* v. *Louisiana Public Service Comm'n*, No. 292,026 (19th Jud. Dist., Parish of East Baton Rouge, La., Oct. 9, 1985) (LP&L).

Court's review of *Mississippi Power & Light* is likely to be substantially affected. We therefore suggest that the Court may wish to consider reviewing this case in tandem with *Mississippi Power & Light* in order to ensure that the full range of relevant jurisdictional issues is addressed.[34]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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September 1987

[34] Although FERC has not yet acted on remand to explain or alter its allocation of Grand Gulf capacity among AP&L and the other MSU operating companies, the court of appeals' decision on rehearing — which held that FERC had not adequately explained why AP&L continued to have the lowest cost nuclear power (App. 94a) —leaves no doubt that AP&L will ultimately be saddled by FERC and the court of appeals with a 36 percent or greater share of Grand Gulf's cost. There is no reason for the Court to await the outcome of the further proceedings below to determine whether FERC has jurisdiction in the first place to force AP&L to purchase Grand Gulf capacity, especially since the jurisdictional issues discussed above present far more profound legal issues than the precise "allocation" to be finally settled upon by FERC and the court of appeals.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

No. 85-1611

Filed Jan 6 1987

MISSISSIPPI INDUSTRIES,

Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent

MISSOURI PUBLIC SERVICE COMMISSION, MISSISSIPPI POWER & LIGHT COMPANY, LOUISIANA POWER & LIGHT COMPANY, ET AL., CITY OF NEW ORLEANS, LOUISIANA, MISSISSIPPI PUBLIC SERVICE COMMISSION, STATE OF ARKANSAS, UNION CARBIDE CORPORATION, OCCIDENTAL CHEMICAL CORPORATION, ARKANSAS & MISSOURI CONGRESSIONAL DELEGATIONS, LOUISIANA PUBLIC SERVICE COMMISSION, ARKANSAS PUBLIC SERVICE COMMISSION, JEFFERSON PARISH, LOUISIANA, ARKANSAS POWER & LIGHT COMPANY, MIDDLE SOUTH ENERGY, INC., MIDDLE SOUTH SERVICES, INC., AND CITIES OF CONWAY AND WEST MEMPHIS, ARKANSAS,

Intervenors

No. 85-1613, 85-1620 & 85-1621

MISSISSIPPI PUBLIC SERVICE COMMISSION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMMISSION,
Respondent

No. 85-1615

ARKANSAS POWER & LIGHT COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1616

MISSISSIPPI POWER & LIGHT COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1617

LOUISIANA PUBLIC SERVICE COMMISSION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1618

OCCIDENTAL CHEMICAL CORPORATION, ET AL.,
Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1619

REYNOLDS METALS COMPANY, ET AL.,
Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1623

EDWIN LLOYD PITTMAN, ATTORNEY GENERAL OF THE STATE OF MISSISSIPPI,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1624

ARKANSAS AND MISSOURI CONGRESSIONAL DELEGATIONS,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1626

ARKANSAS PUBLIC SERVICE COMMISSION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1637

STATE OF ARKANSAS,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1640

MISSISSIPPI LEGAL SERVICES COALITION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1647

CITY OF NEW ORLEANS,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1712

MISSOURI PUBLIC SERVICE COMMISSION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1719

REPRESENTATIVE WEBB FRANKLIN,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

No. 85-1772

JEFFERSON PARISH, LOUISIANA,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

PETITIONS FOR REVIEW OF ORDERS OF THE FEDERAL ENERGY REGULATORY COMMISSION

Before: Edwards And Bork, Circuit Judges, And Wright, Senior Circuit Judge.

JUDGMENT

These causes came on to be heard on the petitions for review of orders of the Federal Energy Regulatory Commission, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the orders of the Federal Energy Regulatory Commission under review herein are hereby affirmed, in accordance with the Opinion for the Court filed herein this date.

Per Curiam

For The Court

/s/George A. Fisher
Clerk

Date: January 6, 1987
Opinion Per Curiam.
Separate opinion by Circuit Judge BORK, concurring in part and dissenting in part.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

No. 85-1611

And Consolidated Cases Nos. 85-1613,
85-1615, 85-1616, 85-1617, 85-1618,
85-1619, 85-1620, 85-1621, 85-1623,
85-1624, 85-1626, 85-1637, 85-1640,
85-1647, 85-1712, 85-1719, 85-1772.

Filed Apr 3 1987

MISSISSIPPI INDUSTRIES

v.

FEDERAL ENERGY REGULATORY COMMISSION

BEFORE: Edwards and Bork, Circuit Judges; Wright, Senior Circuit Judge

ORDER

Upon consideration of the petition for rehearing of the City of New Orleans, Louisiana, the petition of Mississippi Industries, the Mississippi Attorney General and the Mississippi Public Service Commission, and of the petition of Mississippi Power and Light Company, it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

/s/By: Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

No. 85-1611

And Consolidated Cases Nos. 85-1613,
85-1615, 85-1616, 85-1617, 85-1618,
85-1619, 85-1620, 85-1621, 85-1623,
85-1624, 85-1626, 85-1637, 85-1640,
85-1647, 85-1712, 85-1719, 85-1772.

Filed Apr 3 1987

MISSISSIPPI INDUSTRIES

v.

FEDERAL ENERGY REGULATORY COMMISSION

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D.H. Ginsburg, Circuit Judges

ORDER

The suggestion for rehearing *en banc* of the City of New Orleans, Louisiana, the suggestion of Mississippi Industries, the Mississippi Attorney General and the Mississippi Public Service Commission, and the suggestion of Mississippi Power and Light Company were circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular

active service voted in favor of the suggestions. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that these cases will be reheard by the Court sitting *en banc*, such rehearing to be limited to the issues raised by the dissenting opinion of January 6, 1987. It is

FURTHER ORDERED, by the Court *en banc*, that those parts of Section III(C)(2) of the opinion of January 6, 1987, which address the two issues raised in the dissenting opinion, specifically, pages 76 to the end of the first paragraph on page 80, and the judgment of the same date insofar as it concerns those issues, are hereby vacated. It is

FURTHER ORDERED, by the Court *en banc*, that briefs limited to the issues identified in the dissenting opinion of January 6, 1987 shall be filed in accord with the following schedule:

Petitioners' brief (limited to 15 pages) ..... May 29, 1987

Brief of respondent (limited to 25 pages) and briefs of supporting intervenors, if any (limited to 10 pages) ..... July 30, 1987

The parties shall submit 30 copies of each brief filed. In light of the length of the briefing schedule, parties on the same side are expected to circulate drafts of their briefs and to file a joint brief, or briefs, or adopt briefs of other parties, wherever possible. The court looks with extreme disfavor upon numerous briefs presenting repetitive arguments.

The parties are further directed to submit 30 additional copies of all briefs previously filed and 15 copies of the joint appendix by May 29, 1987.

The parties will be advised by future order of the date of argument before the *en banc* court. That date will be sometime after commencement of the court's 1987 term, on September 8, 1987.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

/s/By: Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

No. 85-1611

And Consolidated Cases Nos. 85-1613,
85-1615, 85-1616, 85-1617, 85-1618,
85-1619, 85-1620, 85-1621, 85-1623,
85-1624, 85-1626, 85-1637, 85-1640,
85-1647, 85-1712, 85-1719, 85-1772.

ORDER #1
June 24, 1987

MISSISSIPPI INDUSTRIES
v.
FEDERAL ENERGY REGULATORY COMMISSION

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Bork, Starr, Silberman, Buckley, Williams and D.H. Ginsburg, Circuit Judges

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Filed Jun 24 1987

ORDER

Upon reconsideration of the suggestion for rehearing *en banc* of the City of New Orleans, Louisiana, the sug-

gestion of Mississippi Industries, the Mississippi Attorney General and the Mississippi Public Service Commission, and of the suggestion of Mississippi Power and Light Company, it is

ORDERED, by the Court *en banc*, on its own motion, that the suggestions are denied. It is

FURTHER ORDERED, by the Court *en banc*, on its own motion, that the Court's order of April 3, 1987, setting these cases for rehearing by the Court *en banc* is hereby vacated. It is

FURTHER ORDERED, by the Court *en banc*, on its own motion, that those parts of Section III(C)(2) of the opinion of January 6, 1987, which address the two issues raised in the dissenting opinion, specifically, pages 76 to the end of the first paragraph on page 80, and the judgment of the same date insofar as it concerns those issues, are hereby reinstated.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

/s/By: Robert A. Bonner

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 19

No. 85-1611

And Consolidated Cases Nos. 85-1613,
85-1615, 85-1616, 85-1617, 85-1618,
85-1619, 85-1620, 85-1621, 85-1623,
85-1624, 85-1626, 85-1637, 85-1640,
85-1647, 85-1712, 85-1719, 85-1772.

ORDER #2
June 24, 1987

MISSISSIPPI INDUSTRIES
v.
FEDERAL ENERGY REGULATORY COMMISSION

BEFORE: Edwards And Bork, Circuit Judges; Wright, Senior Circuit Judge

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Filed Jun 24 1987

ORDER

Upon reconsideration of the petition for rehearing of the City of New Orleans, Louisiana, the petition of Mississippi Industries, the Mississippi Attorney General and

the Mississippi Public Service Commission, and of the petition of Mississippi Power and Light Company, it is

ORDERED, by the Court, on its own motion, that the order of April 3, 1987, denying rehearing by the panel is hereby vacated. It is

FURTHER ORDERED, by the Court, on its own motion, that the petitions are granted. It is

FURTHER ORDERED, by the Court, on its own motion, that, for the reasons stated in the dissenting opinion of January 6, 1987, the Commission's decision is reversed and this case is remanded for reconsideration of the decision to equalize the capacity costs of all nuclear plants, and for an explanation of the criteria used to determine what constitutes "undue discrimination" and of why the Commission's ultimate decision is not unduly discriminatory. It is

FURTHER ORDERED by the Court, on its own motion, that those parts of Section III(C)(2) of the opinion of January 6, 1987, which address these two issues, specifically, pages 76 to the end of the first paragraph on page 80 and the judgment of the same date insofar as it concerns those issues, are hereby vacated.

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

/s/By: Robert A. Bonner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

ELECTRIC RATES: Remand

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C.M. Naeve.

Docket No. ER82-616-032

System Energy Resources, Inc. (formerly, Middle South Energy, Inc.)

Docket No. ER82-483-028

MSU System Services, Inc. (formerly, Middle South Services, Inc.)

ORDER INVITING SUBMISSION OF COMMENTS AND GIVING NOTICE AS TO RATES IN EFFECT

(Issued July 24, 1987)

On June 24, 1987, the United States Court of Appeals for the District of Columbia Circuit, *inter alia:* (1) reversed the Commission's decision in *Middle South Energy, Inc.*, Opinion No. 234, 31 FERC ¶61,305, *reh'g denied*, Opinion No. 234-A, 32 FERC ¶61,425 (1985); and (2) remanded the case for (a) reconsideration of the decision to equalize the capacity costs of all nuclear plants on the Middle South system and (b) an explanation as to the criteria used to determine "undue discrimination" and why the allocation chosen by the Commission is not unduly discriminatory. *Mississippi Industries, Inc.* v. *FERC*, Nos. 85-1611, *et al.* Subsequently, the court issued an order permitting the Commission to continue the present allocation for 30 days from the issuance of the

mandate but subject to refunds, if appropriate, from the date the mandate issues.[1]

Pleadings have been filed, *sua sponte*, by several parties as to the action they believe the Commission should take in light of the remand. The Commission believes that all parties to this case should be afforded an opportunity to submit their views on this issue. We shall therefore permit any party to this case to file, within twenty (20) days of the date of this order, initial comments as to what action the Commission should take in light of the matters remanded by the court. Responsive comments, if any, shall be due within ten (10) days thereafter.

The rates currently on file reflect the allocation ordered by the Commission in Opinion No. 234. No other rates being on file or in effect, the rates filed in compliance with Opinion No. 234 remain in effect. *Arkansas Louisiana Gas Co.* v. *Hall*, 452 U.S. 571 (1981); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *see also Burlington Northern Inc.* v. *United States*, 459 U.S. 131, 141 (1982) ("federal court authority to reject Commission rate orders for whatever reason extends to the orders alone, and not to the rates themselves").

The Commission orders:

Within twenty (20) days of the date of this order, any party to this case may file initial comments as to what action the Commission should take in light of the matters remanded by the court in *Mississippi Industries, Inc.* v.

---

[1] The court's mandate issued on July 1, 1987.

FERC, Nos. 85-1611, *et al.* Responsive comments shall be due within ten (10) days thereafter.

By the Commission.

(SEAL)

/s/Kenneth F. Plumb,
Kenneth F. Plumb
Secretary.

Nos. 86-1380, 86-1424 and 87-469

Supreme Court, U.S.
FILED
NOV 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARKANSAS PUBLIC SERVICE COMMISSION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ARKANSAS POWER & LIGHT COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

REYNOLDS METALS COMPANY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF RESPONDENT SYSTEM ENERGY RESOURCES, INC. IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission ("FERC" or "Commission"), in order to establish just and reasonable wholesale rates, has the authority to remedy an unduly discriminatory allocation of the output and associated costs of generating capacity among affiliated electric utilities, which participate in an interstate power pooling and coordination arrangement subject to the exclusive jurisdiction of FERC under Part II of the Federal Power Act, 16 U.S.C. § 824, *et seq.* ("FPA").

STATEMENT REQUIRED BY RULE 28.1

System Energy Resources, Inc. (formerly Middle South Energy, Inc.) is a wholly-owned subsidiary of Middle South Utilities, Inc., a public utility holding company registered with the Securities and Exchange Commission pursuant to the Public Utility Holding Company Act of 1935. Middle South Utilities, Inc. also owns all of the outstanding common stock of Arkansas Power & Light Company, Louisiana Power & Light Company, Mississippi Power & Light Company and New Orleans Public Service Inc., each of which is an electric utility operating company, and Electec, Inc., a non-utility company. Other affiliated companies include MSU System Services, Inc. (formerly Middle South Services, Inc.), a service company, System Fuels, Inc., a fuel procurement company, and Associated Natural Gas Company, a natural gas distribution company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

Nos. 86-1380, 86-1424 and 87-469

ARKANSAS PUBLIC SERVICE COMMISSION, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ARKANSAS POWER & LIGHT COMPANY,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

REYNOLDS METALS COMPANY, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF RESPONDENT SYSTEM ENERGY RESOURCES, INC. IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

System Energy Resources, Inc., an applicant in proceedings below before the FERC and intervenor in support of the respondent in the case before the United States Court of Appeals for the District of Columbia Circuit, submits this Brief In Opposition to the petitions for a writ of certiorari.[1]

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit in *Mississippi Industries v. Federal Energy Regulatory Comm'n*, No. 85-1611 (D.C. Cir., 1987) is reported at 808 F.2d 1525 (App. la).[2] By order dated June 24, 1987, the Court of Appeals vacated a portion of its opinion, and reversed and remanded the decision of the FERC for further consideration of certain issues, but left unchanged that portion of its opinion at issue herein. That order is reported at 822 F.2d 1103 (Supp. App. Sa-3). Petitioners in Case No. 86-1380[3] make adequate reference to the two Initial Decisions of Administrative Law Judges of the FERC, the initial opinion of

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[1] The views expressed herein are concurred in and supported by respondents Louisiana Power & Light Company, Mississippi Power & Light Company and New Orleans Public Service Inc.

[2] This opinion and others are contained in the Appendix ("App.") and Supplemental Appendix ("Supp. App.") accompanying the petition in No. 86-1380, and this Brief shall make references to those appendices where appropriate.

[3] *Arkansas Public Service Comm'n v. Federal Energy Regulatory Comm'n*, No. 86-1380 (filed Feb. 20, 1987).

the FERC, and FERC's second opinion denying rehearing.[4]

JURISDICTION

The grounds on which the jurisdiction of this Court is invoked are set forth in the petition.

STATUTES INVOLVED

The applicable statutory provisions are identified in the petition in No. 86-1380 and are set forth in Appendices F and G to that petition (App. 527a-599a).

STATEMENT OF THE CASE

Arkansas Power & Light Company ("AP&L"), Louisiana Power & Light Company ("LP&L"), Mississippi Power & Light Company ("MP&L") and New Orleans Public Service Inc. ("NOPSI") (collectively, "System operating companies") are affiliated electric utility operating companies. They are part of an integrated public-utility system owned by Middle South Utilities, Inc. ("MSU"), a registered holding company under the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79, *et seq.* ("PUHCA"). Collectively, the System operating companies and System Energy Resources, Inc. ("SERI") form a highly integrated network for the transmission and sale of electricity

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[4] *Middle South Energy, Inc.*, 26 F.E.R.C. (CCH) ¶63,044 (1984) (ALJ initial decision) (App. 374a); *Middle South Services, Inc.*, 30 F.E.R.C. (CCH) ¶63,030 (1985) (ALJ initial decision) (App. 223a); *Middle South Energy, Inc. and Middle South Services, Inc.*, 31 F.E.R.C. (CCH) ¶61,305 (1985) (App. 141a); *Middle South Energy, Inc. and Middle South Services, Inc.*, 32 F.E.R.C. (CCH) ¶61,425 (1985) (opinion on rehearing) (App. 97a).

in interstate commerce. App. 378a. Within this network, which is interconnected by an interstate system of extra-high voltage transmission facilities, App. 263a-270a, the System operating companies provide electric service in the states of Arkansas, Louisiana, Mississippi and Missouri, where their retail rates are regulated by five different state or local regulatory authorities.

Since 1951, the construction of new generating facilities by the System operating companies, and the interstate sale for resale of electric capacity and energy among them, has been coordinated in a series of power pooling agreements, each of which has been called the "System Agreement," on file with and subject to the exclusive jurisdiction of the FERC (App. 288a-292a). As required by §§ 11(b) and 2(a)(29) of the PUHCA, the four System operating companies and SERI are integrated electrically so that they can be "operated as a single interconnected and coordinated system" serving a single geographic region.[5]

The System Agreement specifies the manner in which capacity and energy and their associated costs will be shared at the wholesale level among the Sys-

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[5] The original System Agreement was filed at the FERC in 1951. A significantly revised System Agreement was filed and made effective in 1973 in addition to various other more limited revisions from time to time (App. 234a). Prior to the filing of the System Agreement at issue in this case, the preceding System Agreement was approved by the FERC in *Middle South Services, Inc.*, 16 F.E.R.C. (CCH) ¶61,101 (1981), *aff'd sub nom. Louisiana Public Service Comm' v. Federal Energy Regulatory Comm'n*, 688 F.2d 357 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983).

tem operating companies.[6] The generating facilities of the System operating companies are centrally dispatched, without regard to ownership, to obtain the lowest reasonable cost of energy to all the companies consistent with certain operational and reliability considerations.

SERI was formed in 1974 to finance, construct and operate the Grand Gulf Nuclear Electric Station, a two-unit nuclear fueled generating station near Port Gibson, Mississippi required to meet projected needs of the System operating companies (App. 146a-148a). All of the power available to SERI from Grand Gulf Unit No. 1 ("Grand Gulf 1"),[7] which is involved in this case, was to be sold to the System operating companies as sales for resale in interstate commerce under rates approved by the FERC.[8]

In 1982, a newly revised System Agreement and a Unit Power Sales Agreement ("UPSA") for the output of Grand Gulf 1, the two specific agreements involved in this case, were filed at the FERC. The revised System Agreement modified the manner in which the System operating companies share the costs

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[6] "Capacity" is the amount of electric energy available from a generating unit or facility, which is measured in kilowatts. "Energy" is the amount of energy delivered over time measured in kilowatt-hours. In this Brief, capacity and energy, when referred to together, will be called "power" or "output."

[7] SERI owns ninety percent of Grand Gulf 1. A rural electric power association, not involved in this case, owns the remaining ten percent. Construction of Grand Gulf Unit No. 2 is incomplete.

[8] Operating together under applicable agreements, SERI and the System operating companies shall be referred to as the Middle South System in this Brief.

of generating capacity owned directly by them (App. 226a-227a). It anticipated the filing and introduction of the UPSA into the overall contractual arrangements coordinating wholesale power sales within the Middle South System (App. 350a-353a).

All four System operating companies together with MSU, their parent company, jointly participated in the decisions to initiate construction of Grand Gulf 1, to continue and complete the construction, and to allocate the output of the unit (App. 428a). Each System operating company is a party to the UPSA.

Under the UPSA, SERI agreed to sell power from Grand Gulf 1 to the System operating companies (App. 377a-379a). In the UPSA, shares of power applicable to each of the System operating companies were specified in accordance with an earlier agreement among them. The entitlement or allocation shares (expressed as percentages), in conjunction with various cost of service provisions determined what each System operating company would pay for the power. Thus, the entitlement percentages together with the cost of service provisions constitute SERI's wholesale rates for the sale of the output of Grand Gulf 1, and the UPSA was designated by the FERC as SERI's first rate schedule.[9] Collectively, the rates would generate revenues sufficient to recover the costs of SERI's portion of the output of Grand Gulf 1 (App. 378a-379a).

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[9] Capacity purchased by each System operating company under the UPSA also affects the payments the companies make and receive for capacity equalization transactions under the System Agreement. Thus each company's entitlement to power from Grand Gulf 1 under the UPSA directly affects the rates for equalization payments under the System Agreement (App. 33a-34a).

Subsequently, lengthy hearings were held at the FERC in two separate proceedings in which parties, including the regulatory agencies having jurisdiction over the retail rates of each of the System operating companies and the attorneys general of Arkansas, Louisiana and Mississippi, advocated adoption of various output and cost allocation plans. The goal of each of the various proposed allocation plans was to minimize overall power costs to the System operating company or companies located in the jurisdiction of the party proposing the plan. Adoption of any one of these allocation proposals favoring a particular System operating company would have correspondingly increased the allocation of costs to the other System operating companies (App. 229a, 282a-288a, 38la, 384a-386a).

At the conclusion of the proceedings, the FERC issued its opinion which found that the System Agreement and the UPSA, taken together as filed, were unjust and unreasonable (App. 191a).[10] It determined, in order to make the overall power pooling and coordination arrangement of the Middle South System just and reasonable, that the entitlement percentages for Grand Gulf 1 established in the UPSA should be revised as follows:

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[10] An Administrative Law Judge had previously concluded that the proposed allocation of Grand Gulf 1 "results in an unjust, unreasonable, and unduly discriminatory allocation of costs among the Middle South operating companies and the localities and customers served by the Middle South System." *Middle South Energy, Inc.*, 26 F.E.R.C. (CCH) ¶63,044 at 65,108 (App. 414a).

Entitlement Percentages—Grand Gulf 1

Company	As Filed by SERI	As Ordered by FERC
AP&L	0.00%	36%
LP&L	38.57%	14%
MP&L	31.63%	33%
NOPSI	29.80%	17%

(App. 192a).

The Commission concluded that the System Agreement in conjunction with the UPSA as modified by its decision would "achieve just and reasonable results" (App. 191a). Petitioners had argued throughout the hearing dealing specifically with the UPSA that because the entitlement or allocation percentages in the original agreement concerned generating capacity, the FERC had no jurisdiction under the FPA to modify those percentages. These arguments were carefully considered and expressly rejected by the FERC in its opinion and on rehearing. 31 F.E.R.C. (CCH) ¶61,305 at 61,643-61,645 (App. 167a-170a), 32 F.E.R.C. at 61,949 (App. 104a-111a).

FERC also found that the Middle South System constituted a highly coordinated and integrated electric system in which "planning, constructing and operations" are conducted primarily for "the system as a whole," and "major critical decisions, including decisions to build new generating units," are made "for the benefit of the system as a whole" (App. 172a-173a).

On petitions for review, the Court of Appeals unanimously affirmed the Commission's jurisdiction over the UPSA and the System Agreement, and its authority to modify the allocation percentages for Grand Gulf 1:

The distribution of Grand Gulf costs and capacity in the UPSA inevitably affects each operating company's generation costs and, by extension, their wholesale rates. When, as here, generation capacity has been built and planned on a profoundly integrated basis, the Commission properly may examine its allocation as a cost component affecting wholesale rates. For this purpose, the UPSA cannot be examined in isolation. As the Commission stated, the UPSA is "an agreement which 'supplements or supersedes' the coordination arrangements among the MSU utilities, and . . . is a contract 'affecting' rates under the 1982 System Agreement."

* * *

Having determined that all MSU generating capacity, including Grand Gulf, had been built and planned on an integrated basis by the MSU system to meet its collective needs and that the allocation of Grand Gulf would affect wholesale rates within the system, the Commission decided that the affiliated operating companies' arrangement for sharing of capacity costs—as set forth in the UPSA and the 1982 System Agreement—was unjust, unreasonable and unduly discriminatory. Under these circumstances, sections 205 and 206 of the FPA plainly provide FERC with authority to modify the Grand Gulf allocation

agreed to by the operating companies.

App. 33a-34a (footnote omitted), 38a-39a.[11]

REASONS FOR DENYING THE WRIT

A. Introduction

The question presented is governed by the jurisdictional and remedial provisions of Part II of the FPA, 16 U.S.C. §§ 824-824k (App. 527a-554a). Section 20l(b)(1) gives the FERC jurisdiction over all facilities used for the transmission or sale at wholesale of electric energy in interstate commerce. 16 U.S.C. § 824(b)(1). There is no contention that SERI and the System operating companies are not "public utilities," as defined in § 20l(e) of the FPA, 16 U.S.C. § 824(e), or that the UPSA and System Agreement are not contracts for the interstate wholesale sale of electric energy which must be just, reasonable and nondiscriminatory under §§ 205 and 206 of the FPA. 16 U.S.C. §§ 824d, 824e (App. 537a-541a). Therefore, the decision of the Court of Appeals correctly applies well-established principles defining federal authority under the FPA to the unique facts of the Middle South System. The decision below is correct and there is

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[11] The Court of Appeals initially affirmed the Commission's remedy under § 206 prescribing a new allocation, but Judge Bork dissented from this aspect of the decision. The court en banc vacated the portion of the decision from which Judge Bork had dissented and ordered the case reheard. The en banc court subsequently vacated its rehearing order and returned the case to the panel. Ruling unanimously, the panel granted rehearing and reversed the Commission's decision for the reasons set forth in Judge Bork's dissent. It remanded the case for further consideration of the merits of the Commission's allocations (Supp. App. 1a-16a).

no conflict with any decision of any other court of appeals or this Court. Further review of the jurisdictional determination of the FERC and the Court of Appeals is unnecessary and unwarranted.

Petitioners' principal claims concern the FERC's power to remedy what FERC determined to be unreasonable rates as a result of the allocation of the costs and output of Grand Gulf 1 in the UPSA as originally filed. Although two Administrative Law Judges and the FERC itself determined that AP&L, as well as the other System operating companies, should bear an allocation of Grand Gulf 1, petitioners contend that the FERC is powerless to allocate any costs of Grand Gulf 1 to AP&L simply because AP&L's allocation percentage in the UPSA as filed was zero. According to the argument, FERC is helpless to modify the allocation percentages in admittedly jurisdictional rate schedules because § 201(b)(1) denies jurisdiction over facilities used for the generation of electric energy and limits the Commission's jurisdiction to "sales" at wholesale, not "purchases." Thus, they mistakenly argue that FERC had no authority to allocate wholesale power from Grand Gulf 1, or, in any event, had no authority to require AP&L to purchase a portion of the output of Grand Gulf 1.

These claims are without merit. The underlying FERC proceedings address the unique facts and circumstances of two closely related agreements—the UPSA and the System Agreement—which together establish an allocation of wholesale power and associated wholesale costs among the affiliated utility companies of the Middle South System. These agreements involve the sale of the output of generating facilities, including Grand Gulf 1, and not the sale of

any generating facilities themselves. The exclusion of generating facilities from the Commission's jurisdiction does not foreclose or limit in any manner its jurisdiction over a sale of the *output* of generating facilities for resale in interstate commerce.

The System Agreement and UPSA are clearly beyond the authority of any single state to regulate. Federal regulation is essential to assure a just and reasonable allocation of wholesale power and costs among utilities operating in several states, and this regulation does not interfere with the proper role of state regulation in our system of dual rate regulation.

This case is intensely fact-bound and thus the decision of the Court of Appeals does not, as petitioners mistakenly claim, radically restructure the pattern of federal and state jurisdiction Congress has prescribed. Instead, the decision properly disposes of a narrow challenge to FERC's broad and exclusive authority to regulate public utilities under the FPA.

B. The Decision Below Is Consistent With Long-Standing Precedent Regarding The FERC's Jurisdiction Under The Federal Power Act And Does Not Present A Significant, Unanswered Legal Question.

SERI and the System operating companies are public utilities subject to regulation by the FERC under Part II of the FPA.[12] The System Agreement and the UPSA are agreements for the sale of electricity for resale in interstate commerce. Accordingly, the agree-

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[12] Section 201(e) defines "public utility" as "any person who owns or operates facilities subject to the jurisdiction of the Commission under this sub-chapter" (App. 528a). No party contested that SERI and each of the System operating companies are public utilities as defined in the FPA.

ments are required to be filed as jurisdictional rate schedules with the FERC pursuant to § 205 of the FPA and are subject to modification by the FERC pursuant to its exclusive and plenary authority under §§ 205 and 206. *Federal Power Comm'n v. Southern California Edison Co.*, 376 U.S. 205, 215-216 (1964). The Court of Appeals, therefore, correctly held that the FERC has authority to modify the allocation percentages in UPSA, which "inevitably" affect wholesale rates. (App. 33a-34a).

While recognizing that the FERC has the authority and duty to regulate the agreements, the petitioners contend that the FERC's ability to reallocate the output and costs of Grand Gulf 1 among the System operating companies is limited by § 201(b)(1) of the FPA, which provides that the FERC does "not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy." This argument was carefully considered by the Court of Appeals and properly rejected.

Interpretation of the limitation in § 201(b)(1) of the FPA to preclude modification of the allocation of Grand Gulf 1 among the System operating companies would defeat Congress' purpose in §§ 205 and 206 to empower the Commission to revise the terms and conditions of jurisdictional rate schedules found by it to be unjust, unreasonable or unduly discriminatory. For this reason, both the FERC (App. 105a-106a) and the Court of Appeals (App. 41a-43a) correctly concluded that the FERC has jurisdiction over matters pertaining to generating facilities to the extent that

such facilities are used by a public utility for interstate wholesale sales.[13]

Petitioners' contention that *Connecticut Light & Power Co. v. Federal Power Comm'n*, 324 U.S. 515 (1945), supports their interpretation of the generating facilities exclusion in § 201(b)(1) is erroneous. In that case the Court was specifically concerned with the local distribution facilities exception of § 201(b)(1) rather than the generating facilities exclusion, and this distinction was clearly recognized. In any event, in *Connecticut Light & Power* the Court merely held that facilities used to make local retail sales were not subject to the Commission's jurisdiction under § 201 of the FPA (App. 527a-529a) even though some of the power had been transmitted in interstate commerce before it reached the facilities that were to be used for local distribution. In contrast, Grand Gulf 1 is used solely to make interstate wholesale sales to the System operating companies. Thus, the Commission has jurisdiction over matters pertaining to Grand Gulf 1 to the extent that the unit is used to make a sale of electric energy for resale, a subject matter which in the words of § 201(e), is "subject to the jurisdiction of the Commission." The "except" clause of § 201(b) would preclude, of course, FERC jurisdiction over the sale of the Grand Gulf 1 generating facility itself, which would otherwise be subject to FERC's jurisdiction under § 203 of the FPA, 16 U.S.C. § 824b (App. 533a), but it does not preclude jurisdiction over rates for the sale for resale of the

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[13] The FERC has reiterated this determination more recently in *Ocean State Power*, 38 F.E.R.C. (CCH) ¶61,140 at 61,380 n.4 (1987); and *AEP Generating Co. and Kentucky Power Co.*, 38 F.E.R.C. (CCH) ¶61,243 at 61,824 (1987).

unit's output in interstate commerce pursuant to a unit power sales agreement.[14]

Petitioners' contention that the Commission's reallocation of the output and costs of Grand Gulf 1 unlawfully forces AP&L to purchase a portion of the output of Grand Gulf 1 is also erroneous. The decision below properly found no merit to this contention. As observed in detail by the Court of Appeals, the Commission's authority to modify the allocation percentages applicable to Grand Gulf 1 must be viewed in light of the substantiated finding that the UPSA "supplements" the voluntary power pooling and coordination arrangement among the System operating companies (App. 111a). This Court's decision in *Pennsylvania Water & Power Co. v. Federal Power Comm'n*, 343 U.S. 414 (1952), is a compelling precedent that the FERC has jurisdiction to allocate the costs and output of Grand Gulf 1.

Pennsylvania Water & Power concerned the Commission's authority to order continued integrated operations by two utilities and purchases and sales between them. The utilities for more than 20 years had been interconnected and had bought and sold power in a coordinated manner. 343 U.S. at 421. The Commission, under § 206(a), ordered a major reduction in the rates charged by one utility to the other. Dissatisfied, the selling utility then failed to comply and obtained, in other litigation, a declaration that

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[14] A unit power sales agreement like the UPSA provides for a sale of power from a particular generating unit rather than from a system mix of generating resources. The UPSA is an integral part of the total arrangement for wholesale sales within the Middle South System.

the agreement between the two utilities was unenforceable under the antitrust laws. *Id.* at 417, 421.

Since the utility would not make a satisfactory filing to conform the contract to the Commission's rate order, the Commission itself entered an order under § 206 reforming the contract to comply with the order. In the Court's words, the order required the utility to "continue to *buy*, sell, and transmit power in the same coordinated manner" as in the past, but under the lower rates. *Id.* at 421 (emphasis added).

This Court sustained the order. The Court observed that the prior integration of the utilities was a "practice" within the meaning of § 206(a) and that the Commission was empowered under that section to order the integration continued and to determine appropriate contractual terms to that end:

> The Act gives the Commission ample statutory power to order Penn Water and Consolidated to continue their long-existing operational "practice" of integrating their power output....' In ordering such "practice" continued, the Commission was furthering the expressly declared policy of the Act.

Id. at 422-23. The Court said that the legal duty under the terms of service ordered into effect under § 206(a) "springs from the Commission's authority, not from the law of private contracts." *Id.* at 422.

Reynolds Metals Company ("Reynolds") and other Petitioners attempt to distinguish *Pennsylvania Water & Power* on the grounds that it involved the continuation of existing power exchange arrangements, while the FERC order in this proceeding involves

imposition of a new purchase obligation.[15] This attempt is without merit since the FERC and the Court of Appeals both found that the UPSA supplements the "coordination arrangements among the MSU utilities, and . . . is a contract 'affecting' rates under the 1982 System Agreement," which in turn supplements or modifies coordination arrangements dating back to 1951 (App. 34a, 151a). Thus, the fundamental issue involves the reasonableness of proposed modifications and supplements to the terms of a longstanding and evolving power pooling, integration and coordination arrangement subject to FERC's exclusive rate jurisdiction. The rationale and holding of *Pennsylvania Water & Power* are directly on point.

The "forced purchase" argument of Petitioners is further without merit when considered in light of express factual findings regarding AP&L's involvement with Grand Gulf 1. In a finding expressly approved by the Commission (App. 169a-170a), Administrative Law Judge Liebman found "AP&L has been and is an active party and participant in the contracts and in the whole contractual process surrounding Grand Gulf to the same degree as LP&L, NOPSI and MP&L" (App. 428a). The Commission also found that the Middle South System constitutes a highly coordinated and integrated electric system in which major critical decisions, including decisions regarding Grand Gulf 1, have been made from an overall system perspective (App. 169a-189a).

Citing this Court's decision in *Federal Power Comm'n v. Conway Corporation*, 426 U.S. 271 (1976),

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[15] Petition for Writ of Certiorari of Reynolds Metals Company, *et al.*, at 26-27 (Sept. 1987) [hereinafter Reynolds Petition].

Reynolds also asserts that FERC may not impose a remedy which invades a "nonjurisdictional area." Reynolds Petition at 18-19. Thus, Reynolds mistakenly contends that although an agreement may be found to affect wholesale rates (which the UPSA and System Agreement clearly do), it does not necessarily follow "as the Court of Appeals believed" that FERC has jurisdiction to "replace it" with "what FERC believes would be just and reasonable."[16] Reynolds' use and interpretation of *Conway*, however, is out of place.

In *Conway*, the Court correctly observed that the FERC's power to prohibit undue or anticompetitive discrimination in rates subject to its jurisdiction does not invest it with power to order a public utility to increase its *retail* rates, although the FERC could consider the effect of retail rates in relation to *wholesale* rates. 426 U.S. 271, 280 (1976). Since, however, the FERC's remedy in this case only modifies wholesale rates in wholesale rate schedules, there is no invasion of a nonjurisdictional area regarding generating facilities even though generating costs are thereby allocated. It is thus clear that modification

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[16] It is misleading to suggest as Reynolds does (at footnote 16 of its Petition) that the UPSA "determined only the share of Grand Gulf's capacity and costs to be allocated to the operating companies purchasing from MSE [SERI]" but did not determine SERI's rates. The UPSA, like the System Agreement, due to the interaction of allocation percentages and provisions reflecting SERI's cost of service as allocated, clearly affects, indeed establishes, rates. As the Court of Appeals noted, the case of *Minnesota v. Federal Energy Regulatory Comm'n*, 734 F.2d 1286 (8th Cir. 1984), provides a helpful illustration of how agreements among affiliates can "affect" rates.

of the UPSA is within the Commission's express authority under §§ 205 and 206 of the FPA.

C. The FERC's Authority To Regulate The Allocation Of Generating Costs On The Middle South System Does Not Impair Appropriate State Regulation.

The Arkansas Public Service Commission, *et al.* ("APSC"), and Reynolds argue that the decision of the court below improperly permits the FERC to interfere with the exercise of state regulation.[17] But Congress in the FPA gave FERC plenary jurisdiction over all wholesale sales of electricity in interstate commerce except those which Congress explicitly made subject to regulation by the states.

Specifically, no interference with state authority over generating facilities, as reserved to the states in § 201(b)(1), results from the Commission's exercise of its powers under § 206 to determine just and reasonable rates and terms for the UPSA and the System Agreement. Exclusion from the FERC's jurisdiction of "facilities used for the generation of electric energy" is qualified by the phrase in § 201(b), 16 U.S.C. § 824(b), "except as specifically provided in this subchapter and subchapter III of this chapter, . . ." which was added "to remove any doubt as to the Commission jurisdiction over facilities used for the generation of electric energy to the extent provided in other sections." H.R. Rep. No. 1901, 74th Cong., 1st Sess. 74 (1935). Moreover, § 201(a) declares "that Federal regulation of matters relating to generation to the extent provided in this subchapter and of sub-

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[17] Petition for Writ of Certiorari of Arkansas Public Service Commission, *et al.* at 10-13 (February 20, 1987) [hereinafter APSC Petition]; Reynolds Petition at 13-14, 19, 24.

chapter III . . . is necessary in the public interest. . . ."

Section 201(a) also expresses Congress' intent that federal regulation "extend only to those matters which are not subject to regulation by the States." But Congress drew:

> a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making FPC [FERC] jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.

Federal Power Comm'n v. Southern California Edison Co., 376 U.S. at 215-216.

Reynolds cites *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983) for the proposition that the need of a utility for additional generating facilities is a matter for state, not federal, regulation. Reynolds Petition at 19. However, the Court in that decision emphasized that state authority over utility activities relating to power transmitted for resale in interstate commerce was limited by the FPA. The Court stated that the economic aspects of electric generation have long been regulated by states, "[w]ith the exception of the *broad* authority of the . . . Federal Energy Regulatory Commission, over the *need for and pricing of* electrical power transmitted in interstate commerce." *Pacific Gas & Electric*, 461 U.S. at 205-206 (emphasis added).

Therefore, it is unwarranted to imply, as Reynolds does, that the FERC decision constitutes a repudiation of the FPA's purpose to provide "consumer protection" or that "federal regulation necessarily means that the States have no control." Reynolds Petition at 11. The decision does nothing to change the existing scope of authority of FERC and the states under the FPA.

Moreover, exercise of exclusive FERC jurisdiction over the System Agreement and the UPSA is necessary to assure a just and reasonable allocation of power and associated costs among the System operating companies. It is well established that the FERC may modify interstate power pooling, interconnection and coordination arrangements as necessary to assure that they are just, reasonable, and not unduly discriminatory.[18] Attempts by the various retail regulatory agencies to exercise direct jurisdiction over rates and cost allocation methods involved in a multi-state power pooling and coordination arrangement would in all likelihood lead to inconsistent decisions reflecting the parochial interests of each regulatory body, rather than the broad public interest entrusted by Congress to the FERC.[19]

The APSC suggests that the decision of the Court of Appeals creates a regulatory gap in which no reg-

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[18] *See, e.g., Ohio Power Co. v. Federal Energy Regulatory Comm'n,* 668 F.2d 880 (6th Cir. 1982); *Central Iowa Power Coop. v. Federal Energy Regulatory Comm'n,* 606 F.2d 1156 (D.C. Cir. 1979); *Municipalities of Groton v. Federal Energy Regulatory Comm'n,* 587 F.2d 1296 (D.C. Cir. 1978).

[19] *Appalachian Power Co. v. Public Service Comm'n,* 812 F.2d 898, 905 (4th Cir. 1987). *See also, Western Massachusetts Electric Co.,* 23 F.E.R.C. (CCH) ¶61,025 (1983).

ulatory authority will review the prudence of power purchases. APSC Petition at 13-15. Where, as here, the issue involves the allocation of the output of generating facilities among affiliated utilities forming a highly integrated, interstate power pooling and coordinating arrangement, considerations involving the prudence of purchase are necessarily encompassed in the FERC's determination of whether the allocation of generating costs under the UPSA and the System Agreement result in just and reasonable rates. *Appalachian Power Co. v. Public Service Comm'n*, 812 F.2d 898 (4th Cir. 1987).

The grant to the FERC of comprehensive authority over the allocation of wholesale output and costs through the unique kind of interstate power pool arrangements at issue here does not render state regulatory authorities impotent. In order to protect the interests of consumers in their respective states, each affected state and local regulatory authority can intervene in proceedings before the FERC, as was done here, to advocate adoption of allocation methods deemed most appropriate and can directly appeal the FERC's decisions with respect to those proposals.

D. All Other Asserted Reasons For Review Of The Decision Below Are Insubstantial.

None of petitioners' other arguments justify further review of this case. Some suggest that Court review is appropriate because of the potential economic impact which reallocation of Grand Gulf 1 may have on AP&L and its customers.[20] However, potential economic impact on particular parties to this case is related solely to the justness and reasonableness of the

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[20] Reynolds Petition at 10-11.

rates established by FERC on the merits of the case and is not a jurisdictional issue.

The APSC and Reynolds assert that review is warranted because the Court of Appeals misconstrued this Court's recent decision in *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953 (1986).[21] These arguments are diversionary because neither the FERC's jurisdiction to modify the allocation of Grand Gulf 1, nor the lower court's overall analysis upholding FERC's jurisdiction, depends heavily on an interpretation of *Nantahala*. The significance of *Nantahala* rests on its assessment of the obligation of states to recognize in retail rates FERC-allocated wholesale costs as a matter of federal preemption. This proposition is not at issue in this case.

Nantahala, does, however, concomitantly provide useful insight on the separate question whether the FERC may reallocate power pooling costs among an affiliated group of public utilities pursuant to its rate jurisdiction. Thus, the Court of Appeals did not err in simply seeing *Nantahala* as a timely "message" that FERC's jurisdiction under the circumstances presented in this case is unquestionable.

The other bases which the APSC alleges support issuance of a writ of certiorari are similarly without merit. The claim that the Court of Appeals created an unlawful distinction between FERC's authority to allocate wholesale power costs among affiliated utilities forming an integrated, interstate power pool[22] and its authority to allocate wholesale power costs

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[21] APSC Petition at 18-19; Reynolds Petition *passim*.

[22] APSC Petition at 19-21.

among unaffiliated utilities forming an integrated, interstate power pool, is refuted by the Court's reliance in part on power pool decisions involving unaffiliated utilities,[23] and on the conclusion that "the agency may exercise authority under section 206 to modify an unlawful voluntary power pool arrangement negotiated by nonaffiliates." (App. 46a).

The APSC's attempt to characterize the situation as one in which either no jurisdictional sale for resale occurred or, alternatively, one in which any such wholesale sale was accompanied by a "forced purchase" (APSC Petition at 20-21) tries to create an either/or dilemma where none exists. Factually and logically, the allegations of "forced purchase" and "no sale" can be and are answered separately. See the discussion of *Pennsylvania Water & Power*, *supra* at 15-17, showing that the former has no merit and *Minnesota v. Federal Energy Regulatory Comm'n*, 734 F.2d 1286, 1288-89 (8th Cir. 1984) (upholding FERC jurisdiction against the challenge that a coordinating agreement between affiliated public utilities served simply as a mechanism for allocating costs and did not establish a jurisdictional wholesale rate for the sale of electricity), rejecting the latter.

The claim by the APSC that the decision below conflicts with the PUHCA, is contradicted by the repeated approval by the United States Securities and Exchange Commission ("SEC") pursuant to its authority under that act of transactions among SERI

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[23] *Mississippi Industries*, (App. 44a-47a), citing *Pennsylvania Water & Power Co. v. Federal Power Comm'n*, 343 U.S. 414 (1952), and *Central Iowa Power Coop.*, 606 F.2d 1156 (D.C. Cir. 1979).

and the System operating companies relating to Grand Gulf 1, and the SEC's recognition that Congress has entrusted to the FERC exclusive jurisdiction over contracts for the sale of power among these companies.[24]

Reynolds and others also argue that review by this Court is warranted simply because of the precedential impact of the decision below on other power pools. However, as discussed, the decision merely applies the FPA and long-standing precedent to the rate schedules involved, the particular circumstances in which they were made, and the relations among the parties. It has not been shown that these particular facts and circumstances exist in any other case. Thus, any assertion that the precedential impact of the decision below will be far reaching is unpersuasive.

Finally, the APSC and Reynolds suggest[25] that the fact that the Court will give full consideration to *Mississippi Power and Light Co. v. Mississippi*, No. 86-1970 (probable jurisdiction postponed, October 5, 1987), supports or requires a grant of certiorari in this case. However, all that the two cases have in common is that they both involve Grand Gulf 1 in some fashion. In *Mississippi Power and Light Co.*, the question is whether the Supremacy Clause and the Commerce Clause of the Federal Constitution require Mississippi to set retail electric rates on the

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[24] *See, e.g., System Energy Resources, Inc.*, HCAR No. 35-24318, 37 SEC Docket (CCH) 894 (February 18, 1987); *Middle South Utilities, Inc.*, HCAR No. 23579, 32 SEC Docket (CCH) 416 (January 23, 1985) and cases cited therein.

[25] APSC Supplemental Brief at 3-4; Reynolds Petition at 28-29.

basis of the wholesale costs that MP&L has incurred under SERI's wholesale rate schedule that concededly has been in effect as SERI's FERC-approved rate schedule since July of 1985. *Mississippi Power and Light* does not present the narrow challenge to FERC's jurisdiction that the Arkansas parties raise here. Thus, certiorari should not be granted in this case unless it is independently worthy of review by this Court. For the reasons stated above, it is not.

CONCLUSION

For the reasons set forth, the petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARKANSAS PUBLIC SERVICE COMMISSION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR MISSISSIPPI INDUSTRIES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit properly upheld the jurisdiction of the Federal Energy Regulatory Commission to determine cost and capacity allocations in an interstate wholesale power contract among four affiliated utility companies.

STATEMENT PURSUANT TO RULE 28.3

Mississippi Industries was a Petitioner in the Court of Appeals. It was also an intervenor in several of the dockets consolidated by the Court of Appeals.

The Respondent in the Court of Appeals was the Federal Energy Regulatory Commission, which was supported by Petitioner-Intervenors Louisiana Public Service Commission; Jefferson Parish, Louisiana; City of New Orleans, Louisiana; Occidental Chemical Corporation; Georgia Gulf Corporation; and by Intervenors Union Carbide Corporation; Louisiana Power & Light Company; New Orleans Public Service Inc.; Middle South Energy, Inc.; and Middle South Services, Inc.

Other Petitioner-Intervenors in the Court of Appeals were Mississippi Public Service Commission; Mississippi Power & Light Company; Representative Webb Franklin; Edwin Lloyd Pittman, Attorney General of the State of Mississippi; Mississippi Legal Services Coalition; Arkansas and Missouri Congressional Delegations; Arkansas Public Service Commission; Arkansas Power & Light Company; State of Arkansas; Reynolds Metals Company; Cities of Conway and West Memphis, Arkansas; AMAX, Inc.; Missouri Public Service Commission; Arkansas Industries; Representative Wayne Dowdy; Weyerhaeuser Co.; Riceland Foods; and Associated Industries of Arkansas.

PARTIES TO THE PROCEEDING

Mississippi Industries is comprised of Anderson-Tully Co.; Columbus Lumber Co.; Crouse-Hinds Lighting; Great Southern Wirebound Box Co.; Madison Furniture Industries; Chloride, Inc., Automotive Div.; U.S. Axminster; Marathon LeTourneau Co.; Perma "R" Products, Inc.; and Cives Steel Co.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

Nos. 86-1380, 86-1424, and 87-469

ARKANSAS PUBLIC SERVICE COMMISSION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR MISSISSIPPI INDUSTRIES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 808 F.2d 1525 (App. 1a).[1] On June 24, 1987, the original panel vacated a portion of its earlier decision dealing with the merits of this case in an order reported at 822 F.2d 1103.

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[1] Appendix references are to the Appendix accompanying the petition for a writ of certiorari in Arkansas Public Service Commission v. Federal Energy Regulatory Commission, No. 86-1380 (filed Feb. 20, 1987).

The opinions of the Federal Energy Regulatory Commission ("FERC") and its administrative law judges are listed in the margin.[2]

JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 1987. On April 3, 1987, the full Court of Appeals granted rehearing en banc; on June 24, 1987, the full court vacated its grant of rehearing en banc and the panel granted rehearing. By its order of June 24, 1987, the panel vacated the portions of its opinion of January 6, 1987, from which Judge Bork had dissented, reversed in part FERC's prior decisions, and remanded the case to FERC for reconsideration and explanation of certain issues.

The jurisdiction of this Court has been invoked under 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISIONS

Part II of the Federal Power Act, 16 U.S.C. §§ 824-824k (1982), is reprinted in full at App. 527a-554a.

Section 201(b)(1) of the Federal Power Act, 16 U.S.C. § 824(b)(1) (1982), provides:

> The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the

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[2] Middle South Energy, Inc., 31 F.E.R.C. (CCH) ¶ 61,305 (1985) (App. 141a); Middle South Energy, Inc., 32 F.E.R.C. (CCH) ¶ 61,425 (1985) (opinion on rehearing) (App. 97a); Middle South Services, Inc., 30 F.E.R.C. (CCH) ¶ 63,030 (1985) (ALJ initial decision) (App. 223a); Middle South Energy, Inc., 26 F.E.R.C. (CCH) ¶ 63,044 (1984) (ALJ initial decision) (App. 374a).

> exportation of hydro-electric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

Section 206(a) of the Federal Power Act, 16 U.S.C. § 824e(a) (1982), provides:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

STATEMENT OF THE CASE

This case concerns the jurisdiction of the Federal Energy Regulatory Commission ("FERC" or "Commission") to allocate the electrical output and associated costs of the Grand Gulf Nuclear Generating Unit No. 1 ("Grand Gulf") among four affiliated signatories of a Unit Power Sales Agreement ("UPSA"). Grand Gulf is owned and operated by System Energy Resources, Inc. ("SERI"),[3] a wholly-owned subsidiary of Middle South

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[3] SERI was formerly named Middle South Energy, Inc. prior to a change in corporate name.

Utilities, Inc. ("MSU").[4] Four operating-company subsidiaries of MSU—Arkansas Power & Light Company ("AP&L"), Louisiana Power & Light Company ("LP&L"), Mississippi Power & Light ("MP&L"), and New Orleans Public Service, Inc. ("NOPSI")—purchase power at wholesale from each other and from SERI in interstate commerce. The assets of SERI include the Grand Gulf generating unit and a step-up transformer connecting the generating unit to transmission lines owned by the MSU operating-company subsidiaries.

AP&L was a signatory to every agreement since 1974 concerning the allocation of Grand Gulf among the affiliated MSU operating companies. Since 1974, AP&L has been extensively involved in the planning of Grand Gulf.[5] Moreover, AP&L assumed a continuing financial responsibility for Grand Gulf.[6] However, by the time the UPSA was signed, in June 1982, AP&L's allocation of Grand Gulf was reduced to zero percent. The UPSA was filed with the Commission as an interstate wholesale power contract, and Petitioners do not challenge that the UPSA is a contract governing sales of electricity for resale in interstate commerce.

The Commission also reviewed the third in a series of System Agreements among the four MSU operating companies. The 1982 System Agreement, like the earlier 1951 and 1973 System Agreements, was designed to transfer payments among the operating companies to achieve some equalization of MSU costs. As both the Commission and the court below observed, the UPSA and the 1982 System Agreement are interrelated, and the

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[4] Grand Gulf is 90 percent owned by System Energy Resources, Inc. The percentages applicable to the MSU operating companies discussed herein refer to SERI's share of Grand Gulf.

[5] *See, e.g.*, App. 427a-428a.

[6] *See, e.g.*, the July 1981 Second Amendment to the Availability Agreement; App. 397a-398a.

UPSA is a contract "affecting" the rates of the MSU operating companies under the 1982 System Agreement.[7]

AP&L and Reynolds Metals Company, *et al.*, were active participants in proceedings before the Commission relating to the allocation of Grand Gulf power, as were the agencies which regulate the four MSU operating companies—the Arkansas Public Service Commission ("APSC"), the Louisiana Public Service Commission ("LPSC"), the Mississippi Public Service Commission ("MPSC"), and the City of New Orleans ("CNO"). The FERC found that the UPSA allocation of Grand Gulf power was unjust, unreasonable, and unduly discriminatory pursuant to Sections 205 and 206 of the Federal Power Act ("FPA"),[8] and ordered a new allocation of Grand Gulf Power among the operating companies, including an allocation to AP&L of 36 percent. A panel of the United States Court of Appeals for the District of Columbia Circuit unanimously upheld the Commission's jurisdiction to amend the Grand Gulf power allocations in the UPSA. The 1982 System Agreement was also approved by the Commission with only minor modifications, which approval was affirmed by the court below. *Mississippi Industries v. FERC*, 808 F.2d 1525 (D.C. Cir. 1987).

REASONS FOR DENYING THE WRIT

Petitioners now contend, as they contended before the Commission and before the Court of Appeals, that the Commission lacked jurisdiction to allocate any Grand Gulf power under the UPSA to AP&L because, *inter alia*, (1) the Commission improperly asserted jurisdiction over a generating facility, (2) the Commission improperly compelled a "forced purchase", and (3) the Commission improperly intruded on the jurisdiction of the States.

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[7] Middle South Energy, Inc., 32 F.E.R.C. (CCH) ¶ 61,425, at 61,949-50 (1985), *aff'd sub nom.* Mississippi Industries v. FERC, 808 F.2d 1540 (1987).

[8] 16 U.S.C. §§ 824d and 824e (1982).

The merits of the precise reallocation of Grand Gulf power are not before this Court, but have been remanded to the Commission by the Court of Appeals. The issue of the Commission's jurisdiction to allocate Grand Gulf power to AP&L is the only issue raised by Petitioners. Mississippi Industries respectfully submits that the Commission's jurisdiction to allocate Grand Gulf power to AP&L, as well as to LP&L, MP&L, and NOPSI, by reforming an interstate wholesale power contract pursuant to Sections 205 and 206 of the FPA, is clear and unambiguous.

Five congruent opinions on the instant jurisdictional issue by two FERC Administrative Law Judges, the Commission, and the court below confirm that Petitioners do not present an issue warranting review by this Court. Petitioners can cite no case for the proposition that the FERC lacks jurisdiction to reallocate power sales for resale among four affiliated signatories of an interstate contract. Not only is there no conflict between the decision below and decisions of other Courts of Appeals or decisions of this Court, the Commission's action is in full accord with the applicable statute and relevant precedent. Moreover, this case turns on highly specific facts which make the Commission's jurisdiction abundantly clear.

I. There Is No Basis For Petitioners' Assertion That FERC Improperly Exercised Jurisdiction Over A Generating Facility.

Petitioners assert that the Commission's action runs afoul of Section 201(b) of the FPA because the Commission has exercised jurisdiction over a generating facility, specifically Grand Gulf.[9] The generation facility exception of the FPA provides, in relevant part, "The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this sub-

[9] APSC Petition at p. 8; AP&L Petition at p. 5; Reynolds Petition at p. 14.

chapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution. . . ." [10]

First, the Commission has not improperly exercised jurisdiction over a generating facility. No sale or disposition of a generating facility is involved in this case. The APSC states, "The Federal Power Act does not vest in the FERC the jurisdiction to reallocate responsibility for generating facilities among operating companies of a holding company." [11] However, in this case, the responsibility for the ownership and operation of Grand Gulf has not been reallocated—it still resides with SERI.[12] As the APSC itself admits, "[N]o change in ownership resulted from the [Commission's] orders. . . ." [13] Ownership of generation facilities in this case has not been expanded or altered one iota, and the Commission has not trespassed on the statutory exclusion. Thus, what the Commission has done is simply to assert jurisdiction over a sale of power from a generating facility.

Second, although the FPA's generation exclusion limits Commission jurisdiction over the sale of generating plants qua generating plants, the Act specifically provides for Commission jurisdiction over the wholesale sale of power from such plants in interstate commerce.[14] Contrary to the implication of the APSC,[15] this Court has previously addressed this issue. In *Connecticut Light and Power*

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[10] 16 U.S.C. § 824(b)(1) (1982).

[11] APSC Petition at p. 9.

[12] Petitioners did not object to the filing of the UPSA as an interstate wholesale power contract; however, they now contest the modification to that contract of power allocations which resulted from the filing.

[13] APSC Petition at p. 6 n.7.

[14] 16 U.S.C. § 824(b) (1982).

[15] APSC Petition at p. 8.

Co. v. FPC, 324 U.S. 515 (1945), this Court construed the "local distribution" exclusion of the FPA. There, the local distribution facilities were wholly intrastate, and the Court found that they were not jurisdictional. The electricity flowing to the local distribution facilities, in *Connecticut Light & Power*, came from interstate commerce and was subject to federal jurisdiction, although the local distribution facilities themselves were not. By contrast, Grand Gulf electricity is sold from a generating facility into interstate commerce for resale, and the facility itself is jurisdictional because of that sale. In distinguishing the sale of the output of generation facilities found to be jurisdictional in a lower court case[16] from the situation in *Connecticut Light and Power*, the Court noted that the lower court had "recognize[d] the need for the further step of finding that the generating facilities were used as facilities for interstate wholesale sales. . . ."[17] Similarly, in this case, the Commission has jurisdiction over Grand Gulf to the extent interstate wholesale sales are made from the plant.

Third, under the particular facts of this case, the Commission clearly has jurisdiction over interstate wholesale power sales from Grand Gulf because SERI owns jurisdictional facilities quite besides the Grand Gulf generating facility. Under the UPSA, power generated by Grand Gulf is delivered at SERI's step-up transformer. Such a transformer is classified as a transmission facility by the Commission. *Minnesota Power and Light Co.*, 3 F.E.R.C. (CCH) ¶ 61,045 (1978); *Public Service Co. of New Mexico*, 25 F.E.R.C. (CCH) ¶ 62,269 (1982).[18] SERI's ownership of such a facility—which is jurisdictional because it is used for the transmission of electric energy in

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[16] Hartford Electric Light Co. v. FPC, 131 F.2d 953 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943).

[17] 324 U.S. at 528 n.6.

[18] Petitioners do not dispute that SERI is a public utility.

interstate commerce, 16 U.S.C. § 824(b) (1982)—makes SERI a public utility, 16 U.S.C. § 824(e) (1982), subject to the Commission's jurisdiction, 16 U.S.C. §§ 824d and 824e (1982). Irrespective of the Grand Gulf generating facility, the interstate wholesale sale of power under the UPSA, a contract between SERI—a public utility—and the MSU operating companies, is jurisdictional.

II. The FERC Has Clear Jurisdiction To Determine The Just And Reasonable Rate, Charge, Or Contract Of A Public Utility.

As discussed above, SERI is a public utility under the FPA because it owns and operates Grand Gulf, a facility used for the sale of electric energy at wholesale in interstate commerce, and because it owns and operates a step-up transformer, a facility used for the transmission of electric energy in interstate commerce. Indeed, none of the Petitioners contend that SERI is not a public utility under the FPA. As a public utility, SERI's rates, charges, and contracts are subject to modification by the FERC.

Section 206(a) of the FPA [19] provides:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.

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[19] 16 U.S.C. § 824e(a) (1982).

To contend, as Petitioners do, that the Commission lacks the authority to modify the UPSA, a contract with SERI signed by all four operating companies including AP&L, is tantamount to contending that the FERC must rubber-stamp every cost allocation contract filed with the Commission. Such a position, if correct, would reduce Commission filings to empty gestures and render the FERC's statutory obligation to "fix" such contracts meaningless.

Petitioners' "forced purchase" argument [20] is pure circumlocution. At issue is an interstate power sale to affiliated wholesale purchasers, all of whom are signatories to the interstate power contract. That AP&L's allocation was reduced to zero percent at the time the contract was signed does not vitiate the power of the Commission to modify the contract when, upon review, it finds the contract unjust and unreasonable. All of the operating companies are involved in MSU system planning, all participated in the decision to build Grand Gulf and allocate its output, and all are signatories to the UPSA. Under the circumstances of this case, there is nothing talismanic or exculpatory about a zero percent, as opposed to some other specific percent, allocation.

Petitioners criticize the opinion of the court below because that court upheld the Commission's jurisdiction to modify the UPSA as a "contract affecting rates." [21] The APSC states, "Pursuant to the same reasoning, the FERC would have to review and approve or alter management decisions on contracts with labor, the purchase of trucks, the purchase of computers or the purchase of office equipment, all of which 'affect' rates." [22] Petitioners' point sweeps too broadly.

First, not only is the UPSA a contract for the wholesale sale of energy in interstate commerce, it is also a

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[20] APSC Petition at p. 20.

[21] 808 F.2d at 1540.

[22] APSC Petition at p. 10 n.8.

contract affecting rates and charges pursuant to Section 206 of the Federal Power Act because it affects the 1982 System Agreement. Because the UPSA is a jurisdictional contract which affects another jurisdictional contract—the 1982 System Agreement—the effect of nonjurisdictional contracts is not relevant to this case.

Second, as the court below recognized, the Commission's authority to order a purchase or sale of power in the context of an historically integrated and centrally planned utility system is well-established.[23] *See Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414 (1952); *Central Iowa Power Cooperative v. FERC*, 606 F.2d 1156 (D.C. Cir. 1979). Third, although the Commission did not do so in this case, it is well-recognized that the FERC's authority to alter a contract affecting rates extends to allocating all utility costs on a system-wide basis. *See Connecticut Power and Light Co.*, 55 F.P.C. 1986, 1989 (1976); *Georgia Power Co.*, 52 F.P.C. 1343, 1349 (1974). The United States Court of Appeals for the Fourth Circuit has observed that rolled-in costing is a matter of Commission discretion:

> While all of this evidence does suggest a basis for the Commission to order rolled-in costing, it does not compel the conclusion that the Commission must, as a matter of law, consolidate costs for ratemaking purposes. A decision to order roll-in is essentially a matter of Commission discretion. . . .

Nantahala Power and Light Co. v. FERC, 727 F.2d 1342, 1348 (4th Cir. 1984).

Finally, and most importantly, the Commission's modification powers extend not only to rates and to contracts

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[23] The 1951, 1973, and 1982 System Agreements signed by all four operating companies were designed to transfer payments among the operating companies to achieve some equalization of MSU costs.

affecting rates, but to charges.[24] The cost allocations contained in the UPSA are charges to the individual operating companies which the Commission must modify if it finds them to be unjust and unreasonable. The Commission's duty to modify an unjust or unreasonable charge obtains, by the plain language of the statute, irrespective of a contract which "affects" a charge or a rate. Thus, because the language of FPA Section 206 is mandatory, not precatory, fixing the charge to AP&L above zero percent, after a finding that a zero percent charge was unjust and unreasonable, was not only within the Commission's jurisdiction, it was unambiguously required by the statute.[25]

III. The FERC's Action Does Not Trench Upon The States.

Petitioners argue that the States can and should regulate interstate wholesale purchases by individual utilities, contending that any fear of "irreconcilable, 'parochial' actions by the various States" [26] is groundless. First, the States lack the power to regulate interstate wholesale sales of electric energy because such sales are subject to the exclusive jurisdiction of the FERC. *FPC v. Southern California Edison Co.*, 376 U.S. 205, 215-16 (1964); *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375 (1983); *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 205-06 (1983).

Second, as this Court has recently and unanimously affirmed in *Nantahala Power & Light Co. v. Thornburg*,

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[24] The charges in the UPSA are computed by multiplying Grand Gulf rates times the entitlement percentages in the UPSA.

[25] Thus, Reynolds' argument that this Court's decision in FPC v. Conway Corp., 426 U.S. 271 (1976), precludes the Commission's action in this case is incorrect. The Commission's authority to set a just and reasonable interstate wholesale charge is clearly a jurisdictional "area" over which the Commission has plenary authority. *See*, Reynolds Petition at pp. 18-19.

[26] Reynolds Petition at p. 27.

106 S. Ct. 2349 (1986), even the States' jurisdiction over retail rates is circumscribed by Commission-approved wholesale rate or cost allocation determinations. In *Nantahala*, this Court required recognition in retail rates of a FERC-approved wholesale allocation of costs. The underlying cost allocation in the filed contract had been modified by the Commission, as the UPSA was modified by the Commission in this case. This Court stated:

> Once FERC sets . . . a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A state must rather give effect to Congress's desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.

106 S.Ct. at 2357.

Third, Petitioners' concern that "the FERC has ensured that no regulatory body will effectively review the need for the construction of electric generating facilities . . .,"[27] and that state prudence reviews will be "meaningless",[28] ignores the statutory scheme. Even though interstate wholesale rate matters are within the jurisdiction of the FERC, the initial decision as to the need for a particular plant is made by the local commission having jurisdiction over the situs of the proposed plant.

Prudence reviews concerning interstate wholesale power production and allocation are made, as they must be, by the FERC, in order to avoid the inevitable duplication and possible conflict of multiple state determinations.[29] All of the local regulatory commissions involved here were active participants before the FERC and had a full and fair opportunity to raise issues of prudence.

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[27] APSC Petition at p. 12.

[28] *Id.* at p. 13.

[29] *See* Appalachian Power Co. v. Public Service Commission of West Virginia, 812 F.2d 898, 905 (4th Cir. 1987).

The participation of these commissions before the FERC is not a matter of "denigrat[ion]" as Petitioners claim,[30] but of comity, efficiency, and law.

Finally, the suggestion that FERC should step aside because "State commissions can coordinate and jointly address problems relating to their respective jurisdictions . . ." [31] does not square with reality. In this, Grand Gulf is the archetype. The internecine litigation [32] spawned by the FERC's decision in this case is proof enough that the states alone cannot effectively regulate on an interstate scale.[33]

IV. There Is No Conflict With Other Circuits Or With Decisions Of This Court.

The issues raised by Petitioners have long been settled. Petitioners can cite no case, either of the Circuit Courts of Appeals or of this Court, which conflicts with

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[30] APSC Petition at p. 13.

[31] Reynolds Petition at p. 27.

[32] *See, e.g.*, Mississippi Power & Light Co. v. State of Mississippi, 107 S.Ct. 3247 (1987); Middle South Energy, Inc. v. Arkansas Public Service Commission, 772 F.2d 404 (8th Cir. 1985), *cert. denied sub nom.* Ratepayers Fight Back v. Middle South Energy, Inc., 106 S.Ct. 884 (1986) (AP&L); New Orleans Public Service, Inc. v. City of New Orleans, 782 F.2d 1236 (5th Cir. 1986), later op., 798 F.2d 858, *cert. denied*, 107 S.Ct. 1910 (1987) (NOPSI); Louisiana Power & Light Co. v. Louisiana Public Service Commission, No. 292,026 (19th Jud. Dist., Parish of East Baton Rouge, La., Oct. 9, 1985) (LP&L).

[33] The additional arguments raised by Petitioners—that the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79-79z-6 (1982), bars Commission jurisdiction, APSC Petition at p. 21, and that the *Mobile-Sierra* doctrine's "public interest" standard has not been met, AP&L Petition at p. 5—were amply dealt with by the court below. As that court stated, the SEC itself recognized the FERC's exclusive jurisdiction over the UPSA, 808 F.2d at 1550, and the *Mobile-Sierra* public interest standard is not implicated because the UPSA, by its terms, permits unilateral changes in the contract, 808 F.2d at 1552.

the decision below. The only two cases arguably on point, *Connecticut Light and Power Co. v. FPC*, 324 U.S. 515 (1945), and *Hartford Electric Light Co. v. FPC*, 131 F.2d 953 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943), are fully consistent with the unanimous decision of the United States Court of Appeals for the District of Columbia Circuit on the issue of the Commission's jurisdiction.

CONCLUSION

For the foregoing reasons, Mississippi Industries respectfully submits that the petitions for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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Nos. 86-1380, 86-1424 and 87-469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARKANSAS PUBLIC SERVICE COMMISSION;
STATE OF ARKANSAS;
ARKANSAS-MISSOURI CONGRESSIONAL DELEGATION;
AND MISSOURI PUBLIC SERVICE COMMISSION,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ARKANSAS POWER & LIGHT COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

REYNOLDS METALS COMPANY;
ASSOCIATED INDUSTRIES OF ARKANSAS;
RICELAND FOODS, INC.; AND WEYERHAEUSER COMPANY,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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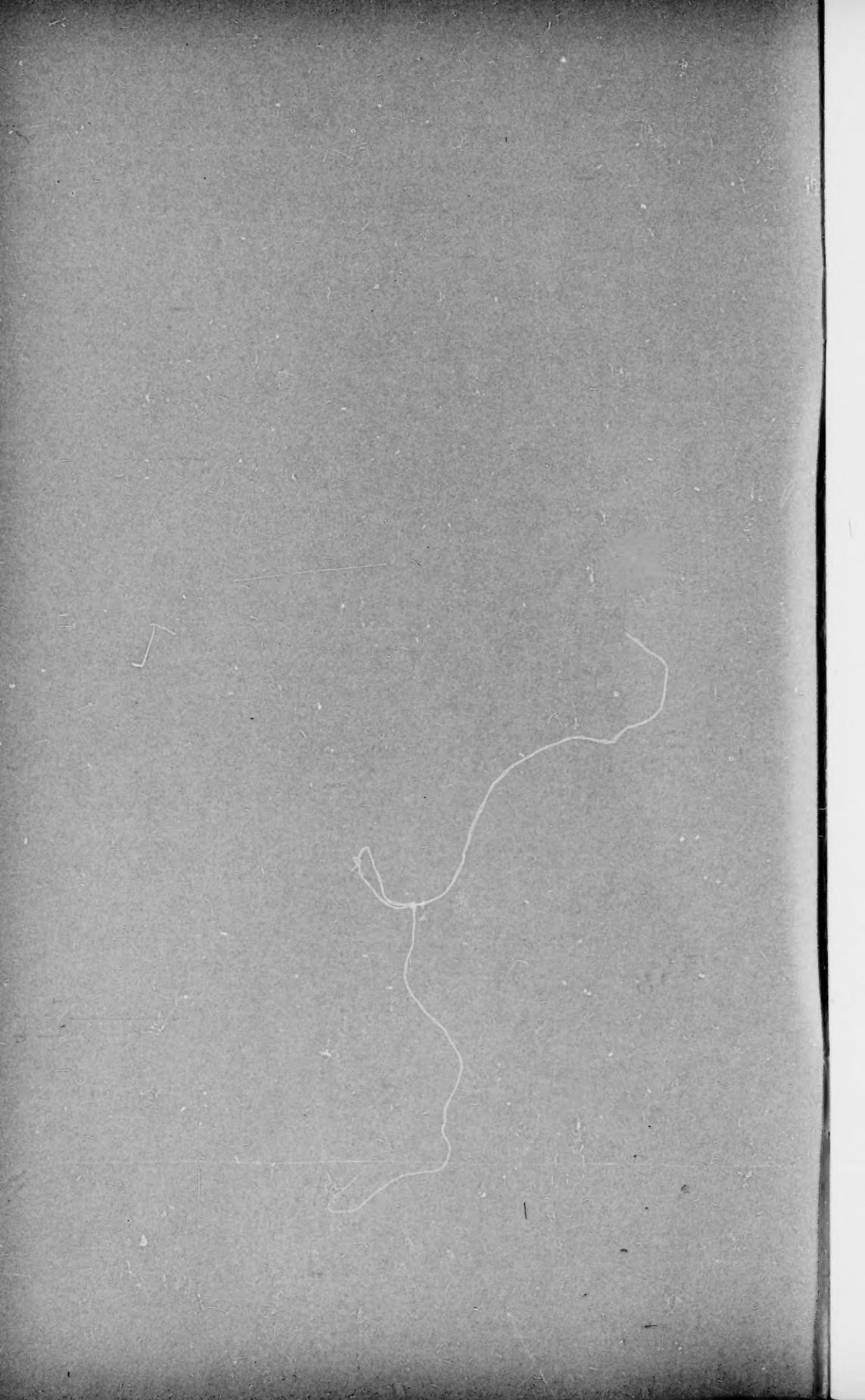
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November 13, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001



QUESTION PRESENTED

In the context of an interconnected, highly-integrated, multistate utility system consisting solely of wholly-owned affiliates of a public utility holding company which had established a practice of equitably sharing generation costs for over thirty years, did the Federal Energy Regulatory Commission have the authority to modify an agreement filed with it under Sections 205 and 206 of the Federal Power Act in order to remedy an unduly discriminatory allocation of generation costs among the affiliates and to fix a just and reasonable allocation which was designed to preserve the system's historic cost-sharing practice?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1380

ARKANSAS PUBLIC SERVICE COMMISSION;
STATE OF ARKANSAS;
ARKANSAS-MISSOURI CONGRESSIONAL DELEGATION;
AND MISSOURI PUBLIC SERVICE COMMISSION,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

No. 86-1424

ARKANSAS POWER & LIGHT COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

No. 87-469

REYNOLDS METALS COMPANY;
ASSOCIATED INDUSTRIES OF ARKANSAS;
RICELAND FOODS, INC.; AND WEYERHAEUSER COMPANY,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

Respondents Occidental Chemical Corporation ("Occidental") and Georgia Gulf Corporation ("Georgia Gulf") are the two largest industrial customers of Louisiana Power & Light Company ("LP&L"), one of the operating affiliates of Middle South Utilities, Inc. ("MSU").[1] Respondent Jefferson Parish, Louisiana, is a local government entity which represents its 445,000 residents and its commercial and industrial concerns, all of whom are customers of LP&L.[2] The Louisiana Consumers were active participants in the proceedings before the Federal Energy Regulatory Commission ("FERC" or "Commission")[3] and the court of appeals below. The Louisiana Consumers support the Commission's exercise of its jurisdiction in this case as fundamental to its duties under the Federal Power Act ("FPA"), 16 U.S.C. §§ 824, *et seq.* (1982), and as necessary to eliminate an unduly discriminatory allocation of costs and to protect the interests of all consumers on the MSU system. Therefore, the Louisiana Consumers respectfully submit this Brief in Opposition to Petitions for Writ of Certiorari filed by

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[1] Pursuant to Rule 28.1 of the Court Rules, a list setting forth the parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Occidental Chemical Corporation and Georgia Gulf Corporation is included as an Appendix to this Brief.

[2] Respondents Occidental, Georgia Gulf and Jefferson Parish will be referred to collectively herein as the "Louisiana Consumers."

[3] The agency decisions below are: *Middle South Energy, Inc. and Middle South Services, Inc.*, 31 FERC (CCH) ¶ 61,305 (June 13, 1985) (Opinion No. 234) (App. 141a); *Middle South Energy, Inc. and Middle South Services, Inc.*, 32 FERC (CCH) ¶ 61,425 (September 26, 1985) (Opinion No. 234-A) (App. 97a); *Middle South Energy, Inc.*, 26 FERC (CCH) ¶ 63,044 (February 3, 1984) (ALJ initial decision) (App. 374a); *Middle South Services, Inc.*, 30 FERC (CCH) ¶ 63,030 (February 4, 1985) (ALJ initial decision) (App. 223a).

Appendix references ("App.") in this Brief are to the Appendix accompanying the petition filed by APSC in No. 86-1380. Additional references ("Supp. App.") are to the Supplemental Appendix accompanying the petition filed by Reynolds in No. 87-469.

Arkansas Public Service Commission, *et al.* ("APSC"), Arkansas Power & Light Company ("AP&L"), and Reynolds Metals Company, *et al.* ("Reynolds") in the above-named cases.[4]

STATEMENT OF THE CASE

The instant petitions challenge the authority of FERC to modify an agreement filed with the Commission under Sections 205 and 206 of the FPA, 16 U.S.C. §§ 824d and 824e, in order to achieve a just, reasonable and non-discriminatory allocation of electric generating costs among the four wholly-owned operating affiliates of MSU, a registered public utility holding company under the Public Utility Holding Company Act of 1935 ("PUHCA"), 15 U.S.C. §§ 79 *et seq.* (1982).[5] The MSU operating affiliates—AP&L; LP&L; Mississippi Power & Light Company ("MP&L"); and New Orleans Public Service Inc. ("NOPSI")—sell electric power at both retail and wholesale to customers in a four-state region (Arkansas, Louisiana, Mississippi, and Missouri).[6] These affiliates operate as a highly-integrated, fully-coordinated electric system, with all generating units controlled by the system through a central dispatch office located in Pine Bluff, Arkansas. (App. 172a; 378a).

The Commission found and the court below affirmed that the MSU operating affiliates have for more than

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[4] Because the issues and arguments presented in these petitions are substantially similar, the Louisiana Consumers have consolidated their responses to the three petitions in this Brief in Opposition.

[5] The issue of the specific remedy to cure FERC's finding of discrimination—which the court of appeals found to be "virtually inescapable" (App. 73a)—is currently pending before the agency on remand. (Supp. App. 14a).

[6] While each subsidiary has been established as a separate corporation with its own board of directors, all of the common stock of each subsidiary is owned by MSU. As the sole stockholder, MSU selects the directors of each subsidiary, and MSU and its affiliates have certain common directors and officers. (App. 8a).

thirty years planned, constructed, and operated all generating units on the System on the basis of what is most advantageous and economical for the System as a whole.[7] (App. 66a-68a, 172a-189a). Each operating affiliate provides input into the System planning process, and that process takes into account each affiliate's native load demands. However, the critical decisions involving the construction of new generating units—which operating company will undertake construction, when it will do so, how large a unit will be, and what type of fuel will be used—are System decisions. The Commission and the court below specifically rejected the Arkansas parties' contentions that AP&L was an "autonomous" company which built new units solely with reference to its own needs. (App. 53a, 182a).[8]

The Commission also found and the courts below affirmed that historically the System has sought to achieve a rough equalization of generation costs among the four operating affiliates. (App. 12a, 64a, 69a, 127a,

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[7] FERC's findings regarding the integrated character of the MSU System echoes those made several decades earlier by the Securities and Exchange Commission ("SEC"):

> The record indicates that the electric properties of the four operating companies are interconnected and that since 1930 they have been constructed and operated on a systemwide basis. . . . The construction requirements of the companies are formulated on a system rather than on an individual basis. Thus, the determination of sites and ownership of generating facilities has been on the basis of the most economical and efficient installation from the viewpoint of the system's load requirements rather than the requirements of the individual companies.

In The Matter Of Electric Power & Light Corporation, 29 S.E.C. 52, 63 (1949).

[8] Petitioners attempts to revive those allegations (APSC Pet. at 5-6; Reynolds Pet. at 5-6) must be rejected. Indeed, they are contrary to the fact that for decades AP&L lacked capacity sufficient to meet its own requirements and had, instead, relied on capacity built in Louisiana to meet its needs. (App. 13a, 292a, 393a).

190a). The cost-sharing provisions of the MSU System Agreement, together with the coordinated planning for System generation needs, provided the basis for achieving this practice of equitably allocating the costs and benefits of System operations. As set forth in Section 3.01 of the System Agreement, one of its principal purposes is to provide a "basis for equalizing among the Companies any imbalance of cost associated with the construction, ownership and operation of such facilities as are used for the mutual benefits of all the Companies." (App. 9a). There have been three System Agreements in effect since 1951. While each agreement has incorporated different mechanisms to achieve an equitable sharing of generation costs, the goal of each agreement remained the same. Each of these Agreements was filed with FERC and reviewed for conformity with the requirements of Sections 205 and 206 of the FPA.

With the construction of the System's extremely expensive Waterford 3 and Grand Gulf nuclear plants, this balance was disrupted. The combined cost of these units is approximately $6 billion. This is more than double the total investment cost of all other generating units on the System, yet these two units produce only 13% of the System's electricity. (App. 15a, 287a). Both Waterford 3 and Grand Gulf were planned in the same manner as all other generating units on the System, *i.e.*, with reference to projected System needs. MSU assigned Waterford 3's construction to LP&L, which financed and built the plant. However, MP&L, the affiliate originally assigned to build Grand Gulf, was unable to finance construction of that unit. As a result, MSU formed Middle South Energy, Inc. ("MSE")[9] in 1974 as a separate corporate vehicle to finance, construct, and own Grand Gulf. All four operating affiliates participated in the

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[9] Now "System Energy Resources, Inc."

planning, financing, and construction of Grand Gulf. (App. 8a).[10]

Despite the fact that the planning for Grand Gulf began in the late 1960's and construction commenced in 1974, no allocation plan for Grand Gulf was developed and filed for Commission approval until 1982. In that year, MSU, through MSE and Middle South Services, Inc. ("MSS"),[11] filed two interrelated agreements with the Commission—a new System Agreement and the Grand Gulf Unit Power Sales Agreement ("UPSA").[12] The UPSA not only provided for a pricing mechanism for the sale of capacity and energy from Grand Gulf, but also for the allocation of cost responsibility for that unit. As filed, the UPSA proposed that AP&L be freed of all responsibility for Grand Gulf and assigned responsibility for that unit to LP&L (38.57%), MP&L (31.63%) and NOPSI (29.80%). At the same time, the 1982 System Agreement included a significant modification of the existing provision governing the sharing of generation costs. The *combined* effect of the UPSA and the 1982 System Agreement as filed would have required LP&L ratepayers to bear 100% of the cost of Waterford 3 and 38.57% of Grand Gulf, or almost 70% of the $6 billion cost of the two units. AP&L ratepayers, in contrast, would have assumed *zero* responsibility for these units' costs.

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[10] The Commission explicitly rejected "any assertion or implication by any of the parties that AP&L has had no involvement in the Grand Gulf unit or that the unit was planned only for the other operating companies." (App. 170a; *see also* App. 427a-428a).

[11] Now "MSU System Services, Inc.," the System's service subsidiary.

[12] Contrary to petitioners (*e.g.*, AP&L Pet. at 2-3), the Commission has found that, in view of the "intra-corporate" nature of transactions among MSU's affiliates, the agreements governing those transactions are not based on arms-length bargaining. *Middle South Energy, Inc.*, 31 FERC (CCH) ¶ 61,304, at 61,627 (June 13, 1985); *see also* App. 125a-126a.

In Opinion No. 234, the Commission affirmed its jurisdiction to determine "the appropriate allocation of costs among integrated companies owned by the same parent" as part of its statutory obligation to insure that interstate wholesale rates are just, reasonable, and nondiscriminatory. (App. 141a). In light of its findings concerning System integration and the historic pattern of equitably sharing generation costs, FERC held that MSU's proposed cost allocation, embodied in the filed UPSA and 1982 System Agreement, was unduly discriminatory. The Commission emphasized that the question presented was "whether the 1982 System Agreement and the UPSA, as filed, together will achieve proper cost allocation." (App. 191a). To remedy the unlawful effects of these agreements, the Commission modified each affiliate's responsibility for Grand Gulf under the UPSA.[13] FERC affirmed its findings and remedy on rehearing in Opinion No. 234-A. (App. 97a).

The United States Court of Appeals for the District of Columbia Circuit affirmed FERC's jurisdictional determinations, its factual findings concerning MSU integration,[14] and, initially, the merits of its cost allocation remedy. *Mississippi Industries v. FERC*, 808 F.2d 1525 (D.C. Cir.) ("*Mississippi Industries*"). The court emphasized that the affirmative basis for FERC jurisdiction derived from the agency's authority under the FPA to review, and where necessary modify, agreements "affecting" rates for wholesale sales in interstate commerce:

> The distribution of Grand Gulf costs and capacity in the UPSA inevitably affects each operating company's generation costs and, by extension, their wholesale rates. When, as here, generation capacity has been

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[13] Contrary to petitioners (*e.g.*, APSC Pet. at 12), the Commission did not thereby force a sale of AP&L's "low cost facilities . . . to consumers in Louisiana and Mississippi." (App. 53a n.69).

[14] None of the petitioners before the court of appeals challenged the Commission's findings of fact on the ground that they were not supported by substantial eivdence on the record as a whole.

> built and planned on a profoundly integrated basis, the Commission properly may examine its allocation as a cost component affecting wholesale rates. For this purpose, the UPSA cannot be examined in isolation. As the Commission stated, the UPSA is "an agreement which 'supplements or supersedes' the coordination arrangements among the MSU utilities, and is a contract . . . 'affecting' rates under the 1982 System Agreement."

(App. 33a-34a (footnote omitted)). The court also considered and dismissed the same arguments opposing FERC jurisdiction that had been raised in the agency proceedings below.

Circuit Judge Bork dissented on the merits of the Commission's allocation remedy, but concurred with the majority's "reasoned analysis" of jurisdictional issues, and endorsed the majority's finding "that the [MSU operating] companies are not autonomous and that decisions are made for the System as a whole." (App. 94a-95a).

By order issued April 3, 1987, the court granted rehearing *en banc* for the purpose of considering the issues concerning the merits of FERC's allocation raised in Judge Bork's dissent. *Mississippi Industries v. FERC*, 814 F.2d 773 (D.C. Cir. 1987). (Supp. App. 9a). On June 24, 1987, the *en banc* court vacated its rehearing order, and the panel granted rehearing and remanded the case to FERC for consideration of the issues addressed in the dissent. *Mississippi Industries v. FERC*, 822 F.2d 1103 (D.C. Cir. 1987); 822 F.2d 1104 (D.C. Cir. 1987). (Supp. App. 12a, 14a). FERC has invited and received comments regarding "what action the Commission should take in light of the matters remanded by the court." *System Energy Resources, Inc.*, 40 FERC (CCH) ¶ 61,078 (July 24, 1987). (Supp. App. 16a).

REASONS FOR DENYING THE WRIT

This case concerns the statutory authority of FERC under Sections 201, 205, and 206 of the FPA to modify an allocation of electric generation costs set forth in agreements among affiliates of a highly-integrated utility system that set rates for the sale and exchange of wholesale power in interstate commerce. Petitioners assert that the Commission exceeded its statutory authority in modifying the UPSA to provide that the MSU operating affiliates share equitably in the responsibility for System generation costs. The Commission's authority in this regard, however, has been firmly established by prior decisions of this Court and lower courts, and was properly acknowledged by the agency and the court below. There is no error or misconstruction below to correct, nor any conflict among the courts of appeals to resolve.

The Commission's jurisdiction over the sales for resale in interstate commerce at issue in the proceedings below is clear and fundamental. This Court has repeatedly affirmed the Commission's jurisdiction to regulate interstate wholesale power transactions in accordance with the standards of the FPA. *See, e.g., Nantahala Power & Light Co. v. Thornburg*, 106 S.Ct. 2349 (1986) (*"Nantahala"*); *Pennsylvania Water & Power Co. v. FPC*, 343 U.S. 414 (1952) (*"Pennsylvania Water"*). The courts of appeals have in turn consistently recognized the exercise of federal jurisdiction over sales and exchanges among members of multistate power systems such as MSU. *See Mississippi Industries*; *Appalachian Power Co. v. Public Service Comm'n of West Virginia*, 812 F.2d 898 (4th Cir. 1987) (*"Appalachian Power"*); *Louisiana Public Service Comm'n v. FERC*, 688 F.2d 357 (5th Cir. 1982); *Ohio Power Co. v. FERC*, 668 F.2d 880 (6th Cir. 1982); *South Dakota Public Utilities Comm'n v. FERC*, 690 F.2d 674 (8th Cir. 1982); *see also Middle South Energy, Inc. v. Arkansas Public Service Comm'n*, 772 F.2d 404 (8th Cir. 1985), *cert. denied*, 106 S.Ct. 884 (1986) (*"MSE*

v. APSC"). This consistent judicial acknowledgment of federal jurisdiction is simply a reflection of the recognized need for a single federal agency—rather than multiple and possibly conflicting state authorities—to oversee such interstate power transactions.

Moreover, the principal argument offered by the petitioners are cast in terms which are almost wholly divorced from the relevant facts upon which the jurisdictional determinations below were based, and which are not here in dispute. In particular, the petitioners seek to deny the affiliated, integrated nature of the MSU System and the roles of the System Agreement and the UPSA as bases for setting rates for interstate power sales among those affiliates. Acceptance of petitioners' arguments would require this Court to reassess the factual findings made below, painstakingly derived from a massive record,[15] to determine if the factual predicates for jurisdiction have been satisfied in this case. Such an inquiry is inconsistent with the deference due the exercise of an agency's expertise in this area.

Accordingly, the petitions fail to establish grounds for granting certiorari and should be denied.

I. The Court Below Rightly Held That FERC Has Jurisdiction Under The Federal Power Act To Remedy The Undue Discrimination Resulting From The Allocation Of Generation Costs Originally Proposed By MSU.

A. *FERC Possesses Jurisdiction To Modify The Grand Gulf Unit Power Sales Agreement.*

As the court of appeals emphasized, the basic jurisdictional grant of Section 201 and the directives of Sections 205 and 206, when applied in the context of this case, lead "inexorably to the conclusion that . . . FERC had jurisdiction to modify the Grand Gulf allocation set forth in the UPSA." (App. 33a). Section 201(b) of the FPA,

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[15] The Joint Appendix alone before the court of appeals consisted of approximately 4,330 pages.

16 U.S.C. § 824(b), provides that "[t]he provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." Section 205(a) of the Act, 16 U.S.C. § 824(a), declares that any rate or charge for the sale of electric energy subject to the Commission's jurisdiction that is not just and reasonable "is hereby declared to be unlawful." Section 205(b), 16 U.S.C. § 824d(b), sets forth a specific additional prohibition against "any unreasonable difference in rates, charges, service, facilities, or in any other respect, . . . between localities . . . ." Section 206(a), 16 U.S.C. § 824e(a), provides the Commission with the remedial authority to enforce the Section 205 standards:

> Whenever the Commission . . . shall find that any rate, charge . . . for any . . . sale subject to the jurisdiction of the Commission, or that any . . . contract affecting such rate, [or] charge . . . is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, . . . or contract to be thereafter observed and in force, and shall fix the same by order.

The facts of this case clearly establish FERC's jurisdiction under these statutory provisions to modify the allocation of generation costs proposed by MSU in the System Agreement and the USPA. It is this undisputed jurisdiction over wholesale rates upon which the Commission based its jurisdiction in Opinion Nos. 234 and 234-A. Power travels from the MSU generating units in interconnecting streams of sales for resale in interstate commerce, and the Commission has "complete authority to regulate all of this commingled power flow." *Pennsylvania Water*, 343 U.S. at 422. The System Agreement and the UPSA serve to define the rates for the sale of electric energy at wholesale in interstate commerce between and among MSU's affiliates. (App. 33a-38a, 105a). MSU acknowledged the Commission's Section 201 jurisdiction over these agreements when it submitted them to

the agency in 1982 for determinations of their justness and reasonableness.[16]

The Commission's recognition and the court's affirmance of FERC's jurisdiction under Section 201 are fully consistent with prior cases involving affiliated companies. *See State of Minnesota v. FERC*, 734 F.2d 1286, 1288-89 (8th Cir. 1984) (cost "coordination" transactions among three affiliated utilities which transfer interstate power among the companies and determine the intercompany charges for such power "plainly constitute" FERC jurisdictional wholesale rates); *Appalachian Power*, 812 F.2d at 902; *see also Nantahala*, 106 S.Ct. at 2356; *Nantahala Power & Light Co. v. FERC*, 727 F.2d at 1342, 1348 (4th Cir. 1984).

In addition to setting forth a uniform price to be paid for Grand Gulf power, the UPSA allocates cost responsibility for Grand Gulf among the operating companies. As found by FERC and recognized by the court below, this allocation must be considered in the context of the generation cost-sharing provisions of the System Agreement. (App. 64a, 193a). Contrary to petitioners, the UPSA is not a free-standing rate filing providing for a unit power sale between unaffiliated entities. Rather it is an important constituent component of the System's wholesale power cost allocation plan and, accordingly, directly affects wholesale rates among the operating companies.[17] The UPSA therefore is, as the Commission and

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[16] Both the 1982 System Agreement and the UPSA explicitly provide that they are subject to review and approval by FERC. These agreements are included in the Joint Appendix ("J.A.") filed with the court below. J.A. 245-46, 1562.

The APSC, in the course of criticizing as overbroad the lower court's finding that the UPSA "affects" wholesale rates, states that "[c]ontracts directly affecting rates must be filed and approved by FERC. Contracts indirectly affecting rates need not be so filed and approved." (APSC Pet. at 10 n.8). The UPSA *was* filed with the Commission for approval of its justness and reasonableness.

[17] Reynolds contends that because the UPSA did not allocate any Grand Gulf capacity to AP&L, the UPSA as filed did not thereby

the court below held, a contract within the scope of the Commission's Section 206 remedial jurisdiction.[18]

As such, the UPSA is subject to the exercise of the Commission's broad remedial authority to set just and reasonable rates. *See Pennsylvania Water*, 343 U.S. at 422. FERC cannot fulfill its statutory responsibility under Sections 205 and 206 to set reasonable, nondiscriminatory rates without the concomitant authority to supervise the allocation of costs. Petitioners appear to acknowledge that the Commission has jurisdiction to *approve* the filed UPSA and System Agreement, yet they would deny FERC the authority to *modify* these agreements. Viewed narrowly, the petitioners' arguments constitute an indirect attack on FERC's substantive finding of discrimination in this case. Viewed more broadly, petitioners' arguments represent an attempt to strip the Commission completely of its remedial powers and render its "jurisdiction" over interstate wholesale rates meaningless.

B. *The Commission's Decision Does Not Regulate Generating Facilities In Violation Of The Federal Power Act.*

Petitioners argue that the Commission's action violated Section 201(b) of the FPA, which excludes Commission jurisdiction over generating facilities, "except as specifi-

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affect AP&L's wholesale rates. (Reynolds Pet. at 18). This argument ignores the fact that AP&L's wholesale rates are affected by *both* the UPSA and the System Agreement. The attempt through the UPSA as filed to have AP&L withdraw from cost responsibility for Grand Gulf affected AP&L in an unlawfully preferential manner by giving that affiliate a significantly lower allocation of generation cost responsibility than its sister MSU companies, and thereby departed from the historic practice of integrated operation on the System.

[18] For this reason, FERC's remedy does not, contrary to Reynolds' assertion (Reynolds Pet. at 18), "invade a nonjurisdictional area" in contravention of *FPC v. Conway Corp.*, 427 U.S. 271, 279 (1976).

cally provided in this part and the part next following, ..." 16 U.S.C. § 824(b). (APSC Pet. at 8-10; AP&L Pet. at 5-7; Reynolds Pet. at 21-23). This interpretation seeks to use the "generating facilities" jurisdictional exclusion to nullify the explicit grants of Commission jurisdiction and remedial authority contained in the Act, and accordingly to frustrate *any* effective regulatory oversight of multistate power interchanges such as those set forth in the MSU System Agreement and UPSA. Nowhere, however, do petitioners explain how FERC is exercising jurisdiction over "generating facilities," except to the extent of its jurisdiction over sales for resale in interstate commerce.[19]

This Court has recognized the pervasive nature of the Commission's jurisdiction over rate-related issues affecting electric generating facilities, insofar as those facilities produce wholesale power sold or transmitted in interstate commerce. *See, e.g., Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 205-6 (1983); *United States v. Public Utilities Comm'n of California*, 345 U.S. 295, 308 (1953).[20] The Commission's authority to regulate inter-

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[19] Section 201(b) explicitly states that this exclusion is applicable only to the extent the Commission is not otherwise granted jurisdiction. The exclusion of direct Commission jurisdiction over generating facilities, therefore, does not diminish the Commission's exclusive jurisdiction over sales of electric energy at wholesale in interstate commerce.

[20] Petitioners' reliance upon *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515 (1945) (*"Connecticut"*) for their "generating facilities" argument is misplaced. At issue in *Connecticut* was whether the utility was a "public utility" under the FPA subject to the Commission's jurisdiction. The Court held that the Commission has no jurisdiction over *solely* local distribution facilities even when they carry out-of-state electricity, and, therefore, that the utility, which did not engage in interstate sales for resale, was not a "public utility" subject to the Commission's accounting regulations. Petitioners here urge a broader reading—to exclude federal jurisdiction unless the facilities are used to make interstate wholesales *and* are *not* generating facilities. As discussed above, such

state wholesale rates is plenary and exclusive: the Act draws a "bright line" between federal and state jurisdiction over such rates, making case-by-case resolution of the issue unnecessary. *See, e.g., Nantahala*, 106 S.Ct. at 2356-7;[21] *FPC v. Southern California Edison Co.*, 376 U.S. 205, 215-16 (1964). Having ascertained that the UPSA and System Agreement constituted interstate wholesale rate transactions, the court below properly found that the Commission possesses jurisdiction to regulate them in accordance with the standards of Sections 205 and 206 of the Act.

The circumstances of this case provides particularly compelling justification for the "bright line" delineating FERC's exclusive jurisdiction over interstate wholesale rates. At issue before the Commission was the impact of some $6 billion of new generation capacity on the allocation of costs among four affiliated operating companies with retail sales in four different states and subject to the jurisdiction of five state and local regulatory agencies.[22] To the extent that AP&L sought to withdraw from

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an interpretation is unsupportable. In fact, the Court in *Connecticut*—while it disapproved of the general construction of Section 201(b) offered by the court in *Hartford Electric Light Co. v. FPC*, 131 F.2d 953 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943)—nevertheless endorsed the Second Circuit's determination that generating facilities used as facilities for interstate wholesale sales are "jurisdictional facilities" under 201(b). *Connecticut*, 324 U.S. at 528 n.6.

[21] The APSC suggests that even if, *arguendo*, *Nantahala*'s declaration of federal jurisdictional supremacy applies to power purchase agreements, it does not apply to rates embodied in a unit power sales agreement. (APSC Pet. at 18-19). However, *Nantahala*'s holding, which is based squarely on the FPA's unqualified grant to the Commission of authority over all interstate wholesale rates, cannot be so artificially limited.

[22] APSC notes that this case involves "the transfer over the next ten years of more than $3.5 billion in power costs among electric consumers in four states." (APSC Pet. at 7). AP&L states that "[t]he magnitude of the populations affected and of the costs of

all responsibility for these costs, the costs borne by one or more of its sister companies must be correspondingly increased.

Thus, to the extent that the Commission declines to "interfere" with Arkansas affairs by deciding not to reform the UPSA, it necessarily increases its "interference" in the affairs of one or more of the other states that receive MSU power. Petitioners' arguments are not concerned with the question of Opinion No. 234's impact on state regulation generally, but with the parochial dollar impact of the Commission's allocation on Arkansas.[23]

If petitioners' arguments were to prevail, a jurisdictional void would be created with each state attempting to protect its economic self-interest at the expense of the other states, but lacking the legal authority or practical

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the [Grand Gulf] facility are such that virtually no element of society in these areas is unaffected by the decision below." (AP&L Pet. at 7). According to Reynolds, "[t]here are five million consumers of electric power served by the MSU operating companies in the States of Arkansas, Louisiana, Mississippi and Missouri. Each will be significantly affected by the lower court's interpretation of the Federal Power Act." (Reynolds Pet. at 10).

[23] The Eighth Circuit found that the APSC, in seeking to regulate the agreements setting forth AP&L's financial obligation for Grand Gulf, has attempted "to close its borders to high cost electricity" in order to effect a "preference" for its citizens "at the expense of out-of-state customers." *MSE v. APSC*, 772 F.2d at 417. The court forcefully stated:

> The APSC seeks to cancel the Grand Gulf agreements ostensibly because they have not received the necessary state regulatory approval. Its apparent concern . . ., however, is the economic impact on Arkansas citizens caused by AP&L's participation in Grand Gulf. Given free rein, the APSC would shift this burden to the citizens of Mississippi and Louisiana, citizens who are powerless to influence Arkansas' internal affairs.

Id. at 416-17.

ability to enforce its determinations. Indeed, such internecine sparring among the states has occurred, as the cases cited by Reynolds (Pet. at 28, n.33) in attempting to substantiate the importance of this case demonstrate.

Congress in enacting the FPA recognized the need for federal regulation "over those matters which cannot effectively be controlled by the States." S. Rep. No. 621, 74th Cong., 1st Sess. 18 (1935). As the *Appalachian Power* court emphasized, "[o]nly FERC, as a central regulatory body, can make the comprehensive public interest determination [regarding interstate wholesale rates] contemplated by the FPA . . . . No single state commission has the jurisdiction, and neither can it be expected to have the competence or inclination, to make this broad determination." *Appalachian Power*, 812 F.2d at 905. Balkanization of jurisdiction over interstate wholesale rates in lieu of comprehensive, consistent federal regulation would inevitably discourage the flow of power for resale in interstate commerce that the FPA was intended to promote and protect (*id.* at 905), and, ironically, ring the death knell for multistate, integrated power systems such as MSU.[24] Because Commission jurisdiction over MSU generation cost allocation is necessary to carry out the fundamental purposes of the Act, the petitioners' arguments must be rejected.

Petitioners suggest that the Commission's decision opens the floodgates to extensive FERC regulation of generation facilities which, they argue, is reserved exclusively to the states. (APSC Pet. at 10-13; Reynolds Pet. at 19). Nuclear facilities such as Grand Gulf are in fact

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[24] As the Eighth Circuit found:

> The integrated nature of MSU and MSE, particularly the Grand Gulf project, represents commerce that is interstate in a most basic form. . . . [A]nd the APSC must be prohibited from voiding AP&L's role in the Grand Gulf project.

MSE v. APSC, 772 F.2d at 417.

subject to an extensive, sometimes overlapping set of state and federal regulatory jurisdictions. FERC has simply exercised that exclusive authority assigned to it by Congress. The Commission has not exercised certificate authority jurisdiction over the construction of Grand Gulf, or otherwise determined its plant type, size, or location; this jurisdiction remains fully with the Mississippi Public Service Commission ("MPSC"). (App. 53a, 187a). The Commission has not exercised safety licensing authority over Grand Gulf; this responsibility remains with the Nuclear Regulatory Commission ("NRC"). The Commission has not exercised operating authority over the Grand Gulf unit; this jurisdiction remains the joint responsibility of the MPSC and the NRC. The Commission has not regulated the financing of Grand Gulf; this responsibility remains within the province of the SEC.[25]

The Commission in Opinion No. 234 did exercise its exclusive rate authority over wholesale transactions on the MSU System under the UPSA and the System Agreement. Although Grand Gulf is undeniably a "generating facility," the UPSA was required to be filed with FERC, and FERC possesses authority to review its provisions for conformity with the Act. The Commission in other contexts has considered the costs of specific generating facilities in setting wholesale rates.[26] As the

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[25] In an order denying a challenge by the APSC to MSU's purchase of MSE stock, the SEC emphasized that "contracts for the sale of electric energy among the subsidiaries of MSE [sic] are subject to the exclusive jurisdiction of FERC. . . . Our authority is limited to the financing and refunding aspects of the project." *In the Matter of Middle South Utilities, Inc.*, S.E.C. PUHCA Release No. 23579, 32 S.E.C. Docket 416, at 419 n.15, 421 (January 23, 1985).

[26] *See, e.g., Kansas Gas and Electric Company*, 39 FERC (CCH) ¶ 63,013 (April 24, 1987) (reviewing the prudency of the costs of nuclear plant construction).

court below pointed out, "FERC has not regulated a facility, but rather the wholesale rates of interstate sales within the MSU system." (App. 41a). Petitioners would construe Section 201(b)'s generation facility exclusion to negate any meaningful FERC remedial authority over wholesale rates. This result clearly could not have been intended by Congress. *See, e.g., Bird v. United States*, 187 U.S. 118, 124 (1902) (statutory provision cannot be construed in a manner that renders another portion of the statute superfluous or ineffective); *see also Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 49 (1980) (explicit reservation of power to the states does not operate to extend state regulatory authority to areas which would be vested to federal jurisdiction in absence of express proviso).

C. *The Commission's Decision Does Not Result In An Unlawful "Forced Purchase."*

Petitioners contend that Opinion No. 234, by modifying the provisions of the filed UPSA, "forced" the MSU operating companies to purchase power in quantities other than those "agreed to" in the UPSA and thereby violated the FPA's proscription against forced enlargement of generating facilities. (APSC Pet. at 19-20; AP&L Pet. at 6-7; Reynolds Pet. at 16-21). The "forced purchase" argument, however, rests upon a factual assumption which is bluntly contradicted by the record of this case: that the MSU operating companies are autonomous, independent utilities whose agreements among each other are the result of true, arms-length bargaining. The UPSA as filed was an "agreement" only in the sense that it implemented a cost allocation decision that had been made by the System.

The Commission and the court below rejected the "forced purchase" characterization in light of the integrated character of the MSU System and its coordinated planning for the Grand Gulf unit. To assert that AP&L did not "purchase" Grand Gulf power under the UPSA

is to ignore the substantial evidence of AP&L's intimate involvement in Grand Gulf planning, financing, and construction. AP&L was in the same position as the other three operating companies vis-a-vis Grand Gulf, an intended beneficiary of that unit's anticipated contributions to the System's power needs and responsible for an undefined, but equitable share of the unit's costs, consistent with the intent of the System Agreement and the System's historical pattern of generation cost-sharing. The filed UPSA sought FERC approval for AP&L to be freed of the responsibility for Grand Gulf which it had shared with its sister operating companies from the plant's inception.

As the Commission emphasized, and as the court of appeals affirmed, the issue of a "forced purchase" is irrelevant in a case such as this where FERC makes remedial cost allocations among affiliates with highly-integrated operations. *See, e.g., Pennsylvania Water,* 343 U.S. at 422 ("[t]he Act gives the Commission ample statutory power to order [the subject utilities] to continue their long-standing operational 'practice' of integrating their power output").[27] For this reason, APSC's argument that the opinion of the court below creates a "regulatory gap" regarding the prudence of purchases in the context of unit power sales to wholly-owned subsidiaries is without merit. As the court of appeals observed, "AP&L's supporters are not free to ignore the historical integration of the MSU system and AP&L's continuous involvement and responsibility in planning generation

[27] Contrary to Reynolds' claim (Reynolds Pet. at 26-27), *Pennsylvania Water* does not stand merely for the Commission's authority to secure compliance with its rate orders. What is significant is the nature of the Commission's order in the case, which required a recalcitrant utility to buy, as well as sell, power in exchanges with its integrated pool. It should also be emphasized that the *Pennsylvania Water* utilities, although highly integrated, were not affiliates of the same holding company parent. Thus, the inapplicability of the "forced purchase" proscription is to this extent much clearer in the present context.

capacity for that system." (App. 53a n.93). Having enjoyed the benefits of System integration for decades, AP&L and the APSC cannot now unilaterally attempt to escape the obligations inherent in participation in a highly-integrated enterprise.[28]

Moreover, because FERC's decisions in this case necessarily embodied a finding that the revised allocation was prudent, no "regulatory gap" arises. As the Fourth Circuit has recently held, the Commission's finding that a wholesale cost allocation and resultant rate is reasonable and nondiscriminatory is a binding implicit determination of "prudence." *Appalachian Power*, 812 F.2d at 903-4.[29]

It is important, finally, to emphasize that the Commission and the court of appeals have not "swept within their rulings the potential to 'reallocate' more than half

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[28] The close integration of the MSU operating companies distinguishes two cases relied upon by Reynolds (Pet. at 15 n.14). *Otter Tail Power Co. v. FPC*, 473 F.2d 1253, 1258 (8th Cir. 1973) and *Southern Company Services, Inc.*, 20 FERC (CCH) ¶ 61,332 (September 22, 1982). Those two cases involved transactions between completely unaffiliated strangers.

[29] Reynolds repeatedly asserts that *Nantahala* "assumed . . . that regulating 'the particular *quantity* of power procured by a utility from a particular source' . . . was a matter for State agencies." (Reynolds Pet. at 15; emphasis in quotation from *Nantahala* in original). However, Reynolds has quoted *Nantahala* entirely out of context. Far from affirming a state's authority to undertake prudent review of wholesale power allocated by FERC, *Nantahala* emphasizes that the state is bound by FERC cost allocation determinations:

> [W]e may assume that a particular *quantity* of power procured by a utility from a particular source could be deemed unreasonably excessive if lower-cost power is available elsewhere . . . . But Nantahala's procurement of purchased power is *not* unreasonably large given that Nantahala could not have treated itself as having access to any more low-cost entitlement power than it is eligible to include under FERC's interpretation of what would be a fair allocation.

Nantahala, 106 S.Ct. at 2360 (emphasis in original).

of the entire nation's generating capacity." (Reynolds Pet. at 12). The decisions below were limited to the particular facts of this case, involving interstate wholesale transactions among highly-integrated affiliates of a particular single holding company. Their holdings are not automatically applicable to other, less integrated "pools."

II. No Other Arguments Have Been Offered Which Would Warrant Granting Of The Instant Petitions.

None of the remaining issues addressed by the petitioners merit consideration by the Court. The APSC and Reynolds argue that the decisions below contravene the purposes of the PUHCA by interfering with effective state regulation of the MSU operating companies. (APSC Pet. at 21-22; Reynolds Pet. at 25). This assertion, however, is directly contradicted by the provisions of PUHCA itself and the pronouncements of the SEC regarding the MSU System. Although PUHCA is intended generally to enhance state regulation of public utility companies, it expressly exempts from this policy "integrated public-utility systems"; as noted *supra* at p. 4 n.6, the SEC has found that MSU is one of these coordinated regional systems. Moreover, the SEC has pointedly emphasized that its authority over holding companies extends only to their financial transactions, while authority to regulate their power sales transactions resides exclusively with FERC. *See, supra*, at p. 18 n.24.

The APSC and Reynolds also suggest that the Court grant these petitions in order to aid resolution of the jurisdictional issues presented in No. 86-1970, *Mississippi Power & Light Co. v. Mississippi* (review granted, 56 U.S.L.W. 3204, October 6, 1987) ("*Mississippi Power & Light*"). (APSC Supp. Br. at 3-4; Reynolds Pet. at 28-9). *Mississippi Power & Light* addresses the extent to which the MPSC rate order at issue in that proceeding conflicts with or frustrates the exercise of FERC jurisdiction. The Commission's exclusive jurisdiction

over interstate wholesale rates is unquestioned and need not be clarified in the context of the present case. Moreover, the opinions below properly determined that the MSU UPSA and System Agreement set forth rates which are subject to the Commission's jurisdiction. Therefore, consideration of this case would not assist the Court's resolution of the issue involved in *Mississippi Power & Light.*

CONCLUSION

For the foregoing reasons, the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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November 13, 1987

APPENDIX

LISTING OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

Pursuant to Rule 28.1 of the Supreme Court Rules, the following list sets forth all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates of Occidental Chemical Corporation and Georgia Gulf Corporation:

Occidental Chemical Corporation

Canadian Occidental Petroleum Ltd.—Canada (Dominion)
Direccion Oxy, S.A. de C.V.—Mexico
HCCM, Inc.—California
Hooker Chemical Investment Co.—California
International Ore & Fertilizer Belgium, S.A.—Belgium
International Ore & Fertilizer S.p.A.—Italy
Occidental Chemical Holding Corporation—California
Occidental Electrochemicals Corporation—Delaware
Occidental Minerals (Philippines), Inc.—Philippines
Occidental Petroleum Corporation—Delaware
Occidental Petroleum Investment Co.—California
Occidental Quimica Do Brasil Ltda.—Brazil
Oxy CH Corporation—California
Oxy Chemical Corporation—California
Oxy Metal Industries (France) S.A.—France
Petway Products Distributors, Inc.—New York
Plastiflex, C.A. ("Plastiflex")—Venezuela
Sinteticos S.A. ("Sinteticos")—Columbia
Sumitomo Durez Co., Ltd.—Japan
Tri-States Phosphates, Inc.—California
Trans-Jeff Chemical Corporation—Delaware

Vinimarket-Comercio e Industria de Plasticos Limitada ("Vinimarket")—Brazil
Vino Vinilicos do Nordeste Ltda. ("Vinor")—Brazil
Vulcan Material Plastico S.A. ("Vulcan")—Brazil

Georgia Gulf Corporation

None

Supreme Court, U.S.
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No. 86-1380
No. 86-1424
No. 87-469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARKANSAS PUBLIC SERVICE COMMISSION, *et al.*,
Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents

and

ARKANSAS POWER & LIGHT COMPANY
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents

and

REYNOLDS METAL COMPANY, *et al.*,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals For The District of Columbia Circuit

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BRIEF FOR THE CITY OF NEW ORLEANS IN OPPOSITION TO THE PETITIONS

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QUESTION PRESENTED

Whether the Court of Appeals was correct in affirming the Federal Energy Regulatory Commission's exercise of jurisdiction over interstate wholesale sales of electric energy under section 201 of the Federal Power Act, and its remedial authority under sections 205 and 206 of the Act, by which the Commission ordered a reallocation of nuclear plant project costs among the wholly-owned operating subsidiaries of a utility holding company, where: (i) the project had been planned and constructed for the benefit of all the subsidiaries; (ii) all the subsidiaries were parties to the contracts establishing cost sharing arrangements for the project; and (iii) the original allocation of costs among the subsidiaries, located in different states, was found to be unjust and unreasonable.

PARTIES TO THE PROCEEDING

The City of New Orleans respectfully refers the Court to the list of parties contained in each of the petitions.

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IN THE

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No. 86-1380
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FEDERAL ENERGY REGULATORY COMMISSION, *et al.*
Respondents

BRIEF FOR THE CITY OF NEW ORLEANS IN OPPOSITION TO THE PETITIONS

OPINIONS BELOW

The opinion of the court of appeals is reported at 808 F.2d 1525, and is printed in the Appendix accompanying the petition of the Arkansas Public Service Commission, et al. (No. 86-1380) at App. 1a-96a. The court's order on rehearing vacating a portion of its earlier decision is reported at 822 F.2d 1103 and is contained in the Supplemental Appendix of petitioner Reynolds Metal Company, et al. (No. 87-469) at Supp. App. 14a-15a.

The opinions of the Federal Energy Regulatory Commission ("FERC" or the "Commission") and its administrative law judges leading to the court of appeals decision are *Middle South Energy, Inc.*, 31 FERC ¶ 61,305 (1985) (App. 141a-222a); *Middle South Energy, Inc.*, 32 FERC ¶ 61,425 (1985) (Order Denying Rehearing) (App. 97a-140a); *Middle South Services, Inc.*, 30 FERC ¶ 63,030 (1985) (App. 223a-373a); and *Middle South Energy, Inc.*, 26 FERC ¶ 63,044 (1984) (App. 374a-526a).

JURISDICTION

The petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). Two of the petitioner groups, the Arkansas Public Service Commission, State of Arkansas, Arkansas-Missouri Congressional Delegations and Missouri Public Service Commission (the "Arkansas/Missouri parties"), and Arkansas Power & Light Company ("AP&L"), filed their petitions shortly after issuance of the court's opinion on January 6, 1987, but before the time for requests for rehearing had expired. Proceedings in this Court were deferred once requests for rehearing were filed. The petitioner group that includes Reynolds Metal

Company, Associated Industries of Arkansas, Riceland Foods, Inc. and Weyerheuser Company (the "Arkansas Industries"), filed its petition on September 22, 1987, subsequent to the D.C. Circuit's order on rehearing. The D.C. Circuit's consideration of jurisdictional issues, the focus of the instant petitions, was not affected by the court's decision upon rehearing to remand the case to the FERC to reconsider the methodology used to reallocate the Grand Gulf 1 costs.

STATUTES INVOLVED

The pertinent statutory provisions of the Federal Power Act, sections 201, 205, and 206, 16 U.S.C. §§ 824, 824d and 824e are set forth at App. 527a-541a.

STATEMENT OF THE CASE

In the interest of brevity, the City of New Orleans adopts by reference the "Background" section of the D.C. Circuit opinion (App. 7a-32a) as its statement of the case through the course of proceedings before FERC. In addition, the City of New Orleans states as follows:

The City of New Orleans is a municipal corporation existing under the laws of the State of Louisiana and its Home Rule Charter. The Council of the City of New Orleans (the "Council") exercises all legislative powers of the City, and also is empowered under state law to regulate the rates and other activities of public utilities serving New Orleans. Thus, the City regulates New Orleans Public Service Inc. ("NOPSI"), one of the operating subsidiaries of Middle South Utilities, Inc. ("MSU").

Since 1985, when the FERC issued its order allocating the costs of the Grand Gulf 1 nuclear project,

the Council has been involved in retail ratemaking procedures relating to NOPSI's request for a staggering increase in rates to cover its 17 percent share of the Grand Gulf 1 costs. The Council's regulatory efforts have led to two federal court proceedings by which NOPSI has attempted to prevent the Council from exercising its retail ratemaking functions, including a review of NOPSI's prudence in relation to the retail rate aspects of the Grand Gulf 1 purchases.[1]

In its order instituting the prudence investigation, the Council specifically recognized the FERC's wholesale rate allocation of Grand Gulf 1 costs and stated

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[1] In the first federal court proceeding, *New Orleans Public Service, Inc. v. City New Orleans*, 782 F.2d 1236, *withdrawn in part*, 798 F.2d 858 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1910 (1987), NOPSI sought an injunction ordering the Council to pass through to ratepayers, immediately and without exercising traditional regulatory functions, a 60 percent rate increase that threatened a severe rate shock effect on New Orleans. The action was dismissed by the district court on the basis of the abstention doctrine, a decision that ultimately was affirmed by the U.S. Court of Appeals for the Fifth Circuit. This Court denied *certiorari* on April 20, 1987. The retail rate case was settled by an order involving a phase-in plan to moderate rate shock as well as partial cost absorption by NOPSI shareholders. *See* Council Res. No. R-86-112 (Mar. 20, 1986).

In October 1985, the Council instituted an investigation into the prudence of NOPSI's actions with regard to Grand Gulf 1 as part of the retail ratemaking proceeding. NOPSI initiated a second federal court proceeding to enjoin the investigation. That case was dismissed in December 1986 on the basis, *inter alia*, of the abstention doctrine and lack of ripeness, and is presently before the Fifth Circuit. *New Orleans Public Service, Inc. v. City of New Orleans*, Civ. Act. No. 85-5273 (E.D. La. dismissed Dec. 19, 1986), *appeal docketed*, No. 87-3049 (5th Cir., Jan. 23, 1987) The aforesaid settlement permitted the Council to continue its prudence inquiry.

that the Council would not seek to invalidate any interstate contracts or to have NOPSI pay a rate other than as prescribed by the FERC. Council Res. No. R-85-636 (Oct. 17, 1985). Thus, the City of New Orleans has not and does not challenge the FERC's jurisdiction to allocate the costs of the Grand Gulf 1 nuclear project among the MSU operating companies as an exercise of its authority over wholesale sales of electric energy, the only issue properly before this Court on these petitions.[2]

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[2] The Arkansas/Missouri parties and the Arkansas Industries have suggested that their petitions should be granted in conjunction with this Court's consideration of the appeal in *Mississippi Power & Light Company v. Mississippi, No. 86-1970, juris. postponed*, 56 U.S.L.W. 3242 (U.S. 1987). Supplemental Brief of the Arkansas/Missouri parties at 3-4; Petition of Arkansas Industries at 12; 28-29. The issues in *Mississippi Power & Light*, a case in which the Court's jurisdiction has not yet been established, center on the proper scope of state regulatory retail functions once the FERC has established a wholesale rate. This is an entirely distinct issue from the FERC's jurisdiction over wholesale rates, and the two cases should not be considered together.

THE PETITIONS SHOULD BE DENIED SINCE THE D.C. CIRCUIT'S AFFIRMATION OF FERC'S JURISDICTION OVER AN INTERSTATE WHOLESALE POWER SALES AGREEMENT WAS PROPER AND CREATES NO CONFLICT AMONG THE COURTS OF APPEAL OR WITH OPINIONS OF THIS COURT

In 1982, MSU submitted to the FERC the Unit Power Sales Agreement ("UPSA") for Grand Gulf 1, to which AP&L, a petitioner here, was a signatory. In the UPSA, AP&L agreed to give Middle South Energy, Inc. ("MSE"), the MSU subsidiary formed to finance and own the nuclear project, the right "to unilaterally make application to the FERC for a change in . . . any . . . term or condition of this agreement", including, by definition, those dealing with obligations to purchase and sell (R. 2982). AP&L thus acknowledged FERC jurisdiction of the UPSA. The Arkansas/Missouri parties also have acknowledged FERC jurisdiction of the UPSA in the proceedings below.[3]

Yet once the FERC found the UPSA to be unjust and unreasonable and exercised its remedial powers to reform the agreement, the Arkansas/Missouri parties (that had been unjustly favored by the original UPSA) changed their positions. They developed arguments, rejected first by the administrative law judges, next by the Commission, and a third time by the D.C. Circuit, to deny the FERC's jurisdiction to

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[3] Brief of Intervenors, the Arkansas Public Service Commission, the Missouri Public Service Commission, the Arkansas-Missouri Congressional Delegation, the State of Arkansas, and the Cities of Conway and West Memphis, Arkansas, No. 85-1611 (D.C. Cir. filed Dec. 23, 1985) at p. 18.

remedy the allocation of Grand Gulf 1 costs set forth in the UPSA.

Three principal arguments against the FERC's exercise of jurisdiction are presented by the petitioners here. First, petitioners contend that FERC jurisdiction under section 201 of the Federal Power Act does not extend to generation facilities. Second, they argue that the FERC has unlawfully forced AP&L to purchase Grand Gulf power. Third, the petitioners allege that the FERC intruded on state regulatory authority, and in so doing, contravened the purposes of the Public Utility Holding Company Act ("PUHCA"). These arguments were rejected by the D.C. Circuit in its opinion below.

Petitioners' disagreement with the result reached by the court of appeals is not sufficient justification for invoking this Court's powers of review. Petitioners have not established that in reaching its determination (that the FERC properly exercised jurisdiction under the Federal Power Act to reallocate the costs of the Grand Gulf 1 project among the MSU operating subsidiaries), the D.C. Circuit created a conflict with decisions rendered by other courts of appeal or that it contravened any prior decisions of this Court. Indeed, to the extent this Court has provided guidance on the jurisdictional questions at issue here, the D.C. Circuit's opinion tracks existing precedent. Thus, the case does not warrant Supreme Court review and the petitions should be denied.

A. The D.C. Circuit Properly Found An Affirmative Grant Of Jurisdiction To The FERC Under Section 201, 205, And 206 Of The Federal Power Act.

In upholding the FERC's exercise of jurisdiction over the UPSA, which allocated the Grand Gulf 1

costs among the MSU operating subsidiaries, the D.C. Circuit first examined the affirmative basis for the FERC's jurisdiction. The court properly found a basis for the Commission's jurisdiction under section 201 of the Federal Power Act, 16 U.S.C. § 824, which grants the Commission jurisdiction over "the sale of electric energy at wholesale in interstate commerce" and over "all facilities for such . . . sale . . . ." (App. 32a). The sale of Grand Gulf 1 power by MSE undoubtedly is a "sale of electric energy at wholesale in interstate commerce," and the UPSA, which memorializes the sale, is subject to the FERC's jurisdiction.

Moreover, under section 205 of the Federal Power Act, 16 U.S.C. § 824d, all rates and charges and all rules and regulations affecting such rates and charges must be "just and reasonable." If the Commission determines that any rate or charge or any contract affecting such rate is unjust and unreasonable, the Commission "shall determine the just and reasonable rate, charge . . . or contract to be thereafter observed and enforced, and shall fix the same by order." Section 206 of the Federal Power Act, 16 U.S.C. § 824e. Pursuant to this statutory directive, the Commission found that the UPSA allocation of Grand Gulf 1 costs was unreasonable, and utilized its remedial powers to modify the agreement, an exercise of authority that the court below found to be "plainly within Commission jurisdiction." (App. 37a).

The D.C. Circuit found support for this holding in a decision of the Eighth Circuit involving the Northern States Power ("NSP") Companies, *State of Minnesota v. Federal Energy Regulatory Commission*, 734 F.2d 1286 (8th Cir. 1984). The Minnesota Commission

had argued that the FERC lacked jurisdiction to review an amendment to a "Coordinating Agreement" among the NSP Companies, since the agreement does not establish a wholesale rate for electricity, but rather serves as a mechanism for allocating costs among the NSP affiliates. The Eighth Circuit disagreed, noting that the contract contains numerous provisions authorizing the NSP companies to exchange electric power among themselves in return for payment, and therefore serves to establish wholesale rates. Thus, the proposed amendment, which altered a methodology for determining rate of return, was held to affect the wholesale rate under the agreement and form a basis for Commission jurisdiction. As the allocation of Grand Gulf 1 costs similarly affects the wholesale rate for the MSU companies, a reallocation of those costs upon a determination that the UPSA was unreasonable was within the Commission's jurisdiction. (App. 37a).

The Commission's authority to reallocate costs affecting wholesale rates is also supported by this Court's analysis in *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986). In *Nantahala*, the Court overturned a decision of the North Carolina Supreme Court affirming an order of the North Carolina Utilities Commission which adopted a different methodology for allocating low-cost "entitlement" power between two affiliated companies than the methodology directed by the FERC. The Court held that the FERC's reallocation of entitlement power preempted the state's authority to adopt a different formula since the allocation impacted one of the affiliate's wholesale rates. The D.C. Circuit found *Nantahala* to be analogous:

> FERC's allocation of Grand Gulf's costs and capacity, like the setting of entitlement percentages in *Nantahala Power & Light*, does not set a sales price, but does directly affect costs and, consequently, wholesale rates. We cannot disregard the Supreme Court's clear and timely message that FERC's jurisdiction under such circumstances is unquestionable.[4]

(App. 38a). As held by the court below, the affirmative grant of authority under sections 201, 205 and 206 of the Federal Power Act sustains the Commission's exercise of jurisdiction over the UPSA allocation of Grand Gulf costs.

B. The Federal Power Act Exception For Generating Facilities Does Not Preclude Jurisdiction By The FERC Over This Wholesale Sale.

The Federal Power Act extends FERC jurisdiction over wholesale sales of electricity but excludes jurisdiction "over facilities used for generation of electric energy or over facilities used in local distribution . . . ." 16 U.S.C. § 824(b)(1). Section 201 also provides for "federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III . . . ." *Id.* In the D.C. Circuit's view, the Commission's "regulation" of the MSE generation facility was a legitimate by-product of the FERC's

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[4] The Arkansas/Missouri parties contend that *Nantahala*, which involved a purchased power agreement, is not properly applied to a unit power sales agreement since the latter pertains to a specific generating facility and is therefore exempt from Commission jurisdiction. This distinction does not appear to be critical to the Court's analysis of the FERC's authority in *Nantahala*. Moreover, generating facilities are not entirely exempt from Commission jurisdiction. *See* discussion *infra*, Section B.

power to regulate wholesale rates. The petitioners argue that no such "by-product" of FERC jurisdiction is permissible where generation facilities are involved.

The keystone of the petitioners' argument is the decision by this Court in *Connecticut Light & Power Company v. Federal Power Commission*, 324 U.S. 515 (1945). The *Connecticut Light* case, however, did not focus on the "generating facilities" exception to Commission jurisdiction set forth in section 201(b), but on the "local distribution" exception. Additionally, the case involved the Federal Power Commission's assertion of jurisdiction over an electric utility located and selling exclusively in the state of Connecticut.

Upon reviewing Connecticut Light's system, the Court concluded that "the predominant characteristic of the company's overall operation is that of a local and intrastate service." 324 U.S. at 521. The Court found that the Commission had failed to analyze whether this local nature brought Connecticut Light under the "local facilities" exemption in section 201(b).

The Court discussed the interplay of this jurisdictional exception and the federal interest expressed in section 201(a) of the Act. With respect to the Commission's jurisdiction over interstate sales and transmission, the Court affirmed that:

> Of course as preamble to all of these provisions stands the policy declaration that Federal regulation 'of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest . . .' § 201(a).

Id. at 523.

In contrast to the facts of *Connecticut Light*, MSE's only existing facility, the Grand Gulf 1 project, is a multibillion dollar generating facility planned and constructed to supply capacity and energy to meet the needs of four utilities serving a four-state region. Its *only* sales will be sales at wholesale in interstate commerce to the four utilities in the Middle South power pool. MSE will make no retail sales. It has no local customers or load. It has no distribution system, local or otherwise. MSE's "predominant characteristic", indeed, its sole purpose, is directly antithetical to that of Connecticut Light: it serves only an interstate function and no local function whatsoever.

Thus, the petitioners' attempt to suggest a conflict between the D.C. Circuit opinion and previous rulings of this Court is unavailing. In the circumstances of this case, the FERC's reallocation of costs was entirely proper, despite the fact that a generating facility was affected as a by-product of such regulation.[5]

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[5] In reality, the only effect on the generating facilities is in terms of the sharing of costs of the facility. FERC has not attempted to regulate, *e.g.*, the size, location or operation of the facility. The Arkansas/Missouri parties assert, nevertheless, that if the decision below is left undisturbed, FERC's jurisdiction would be extended to "every major generation facility in the nation . . . ." Petition at 9-10. They also argue that if FERC's assertion of jurisdiction over contracts affecting rates is allowed to stand, FERC would have authority to review and approve, *e.g.*, management decisions on contracts with labor, or the purchase of trucks, all of which affect rates. *Id.* at 10, n. 8. *See also* Arkansas Industries' Petition at 19. These arguments are entirely speculative. The FERC has not attempted to extend its authority to "every major generation facility" or to matters affecting the construction or operation of generation facilities. Certainly, no such extension of FERC authority is involved here.

C. The FERC's Reallocation Of Grand Gulf Costs Did Not Create An Unlawful "Forced Purchase" Of Grand Gulf Power.

The D.C. Circuit also properly rejected petitioners' second argument against FERC's exercise of jurisdiction, *viz.*, that the reallocation of Grand Gulf 1 costs unlawfully "forced" AP&L to purchase Grand Gulf 1 power. The court "agree[d] with the Commission that 'the issue here is not whether a company should be forced to purchase or sell power, but rather is the appropriate allocation of costs among integrated companies owned by the same parent.' " (App. 43a-44a). It is significant that petitioners do not argue to this Court that the court's holding on the "forced purchase" issue creates a conflict with other circuits or decisions of this Court. Indeed, petitioners cite no case law in support of their argument.[6]

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[6] The Arkansas Industries criticize the court's reliance on *Pennsylvania Water and Power Co. v. Federal Power Commission*, 343 U.S. 414 (1952), as precedent for the FERC's authority to modify the terms of coordinating contracts of closely integrated power systems when it deems those arrangements unlawful, on the basis that in *Pennsylvania Water*, the court merely required the continuation of an existing practice. Whether a contractual arrangement is new or long-standing, the FERC's authority to alter the arrangement is clear under section 206 of the Federal Power Act if the contract renders a rate unjust or unreasonable. 16 U.S.C. § 824e. *See also Central Iowa Power Cooperative v. Federal Energy Regulatory Commission*, 606 F.2d 1156 (D.C. Cir. 1979).

Before the D.C. Circuit, the petitioners advanced *Southern Company Services, Inc., 20 FERC ¶ 61,332 (1982) Otter Tail Power Co. v. Federal Power Commission*, 473 F.2d 1253 (8th Cir. 1973), as supportive of their view that a "forced purchase" is unlawful. Those cases were easily distinguished by the D.C. Circuit. In

The Arkansas/Missouri parties suggest that the FERC's reallocation of Grand Gulf 1 costs was impermissible since it created a different standard for purchases among holding company affiliates than the Commission employs for independent utilities. This argument sidesteps the fact that in the circumstances here, a "different standard" may be appropriate: the Grand Gulf 1 plant was constructed for the benefit of all MSU operating companies including AP&L, and AP&L had an historic involvement in the decisions and agreements leading to the UPSA. Indeed, AP&L remains liable to MSE's creditors for a substantial portion of Grand Gulf 1 costs pursuant to the "Availability Agreement." (App. 18a-19a.) AP&L is not an innocent bystander caught in the cross-fire of FERC authority; it was a willing and active participant in the Grand Gulf 1 arrangements, albeit for a lesser share than it ultimately was allocated. The Commission's authority to alter contracts affecting unreasonable rates "allows the Commission to step in and reallocate costs under section 206(a) of the Federal Power Act so that each of the operating companies is treated fairly." (App. 44a).

D. The FERC's Regulation Of Wholesale Rate Matters Does Not Impermissibly Intrude Into State Regulation.

The petitioners' third argument against the Commission's jurisdiction to reallocate Grand Gulf costs

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Southern Companies, an *unaffiliated* company intervened in a proceeding concerning a sale between the Southern Company and Florida Power and Light Company, arguing that Florida Power and Light should be required to purchase power from it. The FERC refused to order such a sale. In *Otter Tail*, a FERC order had the effect of impermissibly compelling expansion of generating facilities. No such order is involved here.

is that it unlawfully interferes with the jurisdiction of state regulatory authorities and contravenes the purposes of PUHCA. The D.C. Circuit properly rejected these arguments. The FERC, not the states, has the authority to regulate wholesale sales of electric energy such as the sale of Grand Gulf 1 power at issue here. As noted by the court: "The fact that FERC's assertion of jurisdiction has some impact on state regulation does not make it unlawful." (App. 48a).[7]

The D.C. Circuit also properly determined that the FERC's reallocation of the Grand Gulf 1 costs did not detract from the goals of PUHCA. While PUHCA is aimed at preserving local regulation of utilities owned by holding companies, PUHCA recognizes that transactions between interstate affiliates must remain within federal jurisdiction. (App. 57a).

It is notable that none of petitioners have advanced a set of facts under which this *particular* exercise of jurisdiction by the FERC interfered with a state's ability to carry out regulation of retail rates. The Arkansas/Missouri parties suggest (along with Arkansas Industries) that prudence reviews at the state level will be precluded if the decision below is allowed

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[7] The D.C. Circuit based its decision in part on this court's ruling in *Nantahala*. The City of New Orleans agrees that *Nantahala* requires states to give effect to wholesale rates established by FERC; the City does not agree, however, that *Nantahala* requires an immediate and complete pass-through of wholesale costs in retail rates. Rather, states retain jurisdiction, under the express holding of *Nantahala*, to perform traditional retail ratemaking functions, including an examination of offsetting costs and the utility management's efforts to effectuate such offsetting measures.

to stand.[8] Yet Arkansas has reached a settlement with AP&L with regard to its share of Grand Gulf 1 costs; Arkansas, unlike the City of New Orleans and Mississippi, has not conducted a prudence investigation as part of its retail regulation of AP&L's Grand Gulf 1 costs.

The permissible scope of the state retail function once FERC has established a wholesale rate has been and is currently the subject of cases presented to this Court. As indicated in the Statement of the Case, in 1985 NOPSI brought suit in federal district court against the City of New Orleans in an attempt to require an immediate pass through of Grand Gulf 1 costs to New Orleans' consumers. The federal court abstained and after the Fifth Circuit affirmed that decision, NOPSI sought review in this Court. Its petition was denied. *New Orleans Public Service, Inc. v. City New Orleans*, 107 S. Ct. 1910 (1987).[9] Additionally, the Court recently decided to hear the appeal (but postponed consideration of jurisdiction to the

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[8] The Arkansas/Missouri parties also speculate that the Commission's ruling will restrict Arkansas' regulation of *new* facilities proposed by AP&L. The existing Grand Gulf plant, not a future facility, is all that is at issue here.

[9] The City's right to conduct a prudence investigation of NOPSI's involvement in Grand Gulf—one which focuses on offsetting actions the utility could have taken to alleviate the burden of its Grand Gulf 1 share, and one which does not have as its object an invalidation of contracts or requiring NOPSI to pay less than its federally mandated share of Grand Gulf 1—is the subject of a second federal court lawsuit which was dismissed by the district court and is presently pending decision by the Fifth Circuit. *See* n. 1, *supra*.

hearing on the merits)[10] in a case involving the permissible scope of a prudence investigation of Mississippi Power & Light Company's involvement in Grand Gulf 1. *Mississippi Power and Light Co. v. Mississippi*, No. 86-1970, *juris. postponed*, 56 U.S.L.W. 3242 (U.S. 1987).

Thus, there are other cases in which this Court may determine, on a more fully developed factual record, the effect of the FERC's establishment of wholesale rates on state regulatory functions. The hypothetical fact patterns presented by the petitioners are not an appropriate basis for this Court's review of such a critical issue.[11]

CONCLUSION

For all the foregoing reasons, the petitions should be denied.

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[10] The State of Mississippi, and the City of New Orleans as *amicus*, argued that the case is not ripe for this Court's review since a final decision on prudence has not emanated from the Mississippi Commission and the Mississippi courts.

[11] Consideration of this case is not essential to the Court's consideration of the *Mississippi Power & Light Co.* appeal, as contended by petitioners. The Commission's exercise of its wholesale rate jurisdiction is an entirely distinct issue from the permissible scope of retail regulation by the states once a wholesale rate is established. Petitioners apparently are attempting to "bootstrap" their way into a grant of their petitions by linking this case with the *Mississippi Power & Light* appeal.

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Nos. 86-1380, 86-1424 and 87-469

In The
Supreme Court of the United States
October Term, 1986

ARKANSAS PUBLIC SERVICE COMMISSION, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ARKANSAS POWER & LIGHT COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

REYNOLDS METALS COMPANY, *et al.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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BRIEF OPPOSING PETITIONS FOR CERTIORARI ON BEHALF OF THE LOUISIANA PUBLIC SERVICE COMMISSION AND STATE OF LOUISIANA

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QUESTION PRESENTED

When the Federal Energy Regulatory Commission historically has regulated the "System Agreement" among operating companies in an electric holding company system, which governs wholesale exchanges of electric energy and reallocates the costs of generating units owned by the companies to equalize responsibility for the units, may the FERC reallocate the costs of an electric generation subsidiary owned by the holding company and created to supply wholesale energy to the System?

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STATEMENT OF THE CASE

1. *Introduction.* The Federal Energy Regulatory Commission ("FERC") and its predecessor, the Federal Power Commission ("FPC"), historically have regulated agreements among the operating companies of the Middle South Utilities ("MSU") System; these agreements establish the terms for exchanging electric energy at wholesale and reapportioning the costs of generating units owned by the companies ("System Agreement"). The operating companies—which serve customers in four states—plan and operate their generation additions on a single system basis. The location, size and type of generating units are centrally planned to secure maximum economies, which often requires that some companies install more, and others less, than their proportionate amount of generating capacity, and that certain companies own disproportionate amounts of certain types of capacity. The System is operated as a single, integrated electric system from a central dispatch center, located in Arkansas. The purpose of the System Agreements has been to provide the basis for the central planning and operation of the System and for "equalizing among the Companies any imbalance of costs associated with the construction, ownership and operation of such facilities as are used for the mutual benefit of all the Companies." (App. 9a-13a; 9a).

In this case, the MSU companies filed two new agreements to apportion the costs of generating units built to serve the System. The 1982 System Agreement provided a new mechanism for equalizing the responsibility for generating capacity owned by the companies. A separate Unit Power Sales Agreement ("UPSA") was filed to

establish tariffs and allocate responsibility for the Grand Gulf 1 nuclear unit ("Grand Gulf"), located in Mississippi and owned by Middle South Energy, Inc. ("MSE"), a separate generating subsidiary owned by MSU. MSE subsequently changed its name to System Energy Resources, Inc., but will be referred to in this brief as MSE. The UPSA provided for the allocation of Grand Gulf among only three of the four operating companies—Louisiana Power & Light Co. ("LP&L"), New Orleans Public Service, Inc. ("NOPSI"), Mississippi Power & Light Co. ("MP&L") and Arkansas Power & Light Co. ("AP&L"). AP&L was a signatory to the UPSA, but was assigned no responsibility for Grand Gulf. (App. 19a-20a; 16a-17a; 19a).

The FERC affirmed findings of an administrative law judge that the Grand Gulf allocation in the UPSA was unreasonable and discriminatory. The ALJ and the FERC determined that past System Agreements had achieved a rough equalization of System generating costs among the companies. Because of huge cost escalations relating to two new nuclear units—the Waterford 3 unit, owned by LP&L, and Grand Gulf—the new capacity equalization mechanism in combination with the UPSA would result in a gross disparity in generation cost responsibilities. The FERC determined that this inequity could be remedied, and the rough pattern of cost equalization preserved, by reallocating Grand Gulf among all the operating companies to achieve a proportionate responsibility for the nuclear capacity costs of the System, and by approving the 1982 System Agreement. (App. 414a, 191a; 391a-92a; 190a; 392a; 410a-11a; 190a-91a; 193a; 132a-33a).

The FERC rejected arguments—raised by public and private parties in Arkansas and Missouri—that it had no jurisdiction to reallocate Grand Gulf. This decision was affirmed by the United States Court of Appeals for the District of Columbia Circuit ("court of appeals"). In three separate petitions for certiorari, the Arkansas and Missouri parties challenge the jurisdictional rulings of the FERC and the court of appeals. (App. 167a-71a; 99a-116a; 32a-61a; Pet. of Ark. Pub. Serv. Com'n, *et al.*, No. 86-1380; Pet. of AP&L, No. 86-1424; Pet. of Reynolds Metals Co., *et al.*, No. 87-469).

2. *MSU System planning.* MSU is a public utility holding company, which owns all the stock of four operating companies—LP&L, AP&L, MP&L and NOPSI. MSU also owns MSE and other subsidiaries. MSU, MSE and the operating companies have overlapping officers and directors. (App. 8a). The chief executive officers of the MSU companies comprise the board of directors of MSE and Middle South Services, Inc. ("MSS"), the service subsidiary of the System. (App. 8a; 289a).

Since 1930, the generation requirements of the operating companies have been centrally planned and constructed to achieve the most economical and efficient operation from the viewpoint of the System as a whole, rather than an individual operating company. The System Operating Committee—made up of representatives of the operating companies and MSS— plans the location, type and size of new generating units and assigns responsibility to construct the units to individual operating companies. The centralized planning approach permits the System to take advantage of economies of scale, local fuel

supplies and other advantages not available to individual operating companies. (*In the Matter of Electric Power & Light Corp.*, 29 S.E.C. 52, 55, 63-65 (1949); App. 289a; App. 10a; App. 392-393a).

The System planning approach caused certain operating companies to lack adequate generating capability for long periods, while others possessed excess capacity. One reason for this phenomenon was the desire to lower System generation costs by locating generating facilities in Louisiana, where abundant supplies of cheap natural gas existed. For more than two decades prior to 1980, AP&L was short of adequate generation and depended on the Louisiana companies to supply a large amount of its power and energy. (App. 292a-93a, 392a-93a).

When MSU embarked on a program of constructing nuclear and coal units, AP&L, as the historically short company and the one with least access to natural gas supplies, was assigned to construct the System's first two nuclear units, ANO 1 and ANO 2. These units had capacity costs somewhat higher than oil and gas units, but did not experience huge cost overruns, as they were installed before the nuclear industry began experiencing pervasive cost overruns. The units were very economical on a total cost basis because they have low fuel costs. In addition, AP&L was assigned the task of installing coal generation, which also was economical on a total cost basis because of relatively low fuel costs. (App. 394a-95a; 419a). The System planned two other nuclear units, Waterford 3 and Grand Gulf, which were beset by delays and huge cost escalations. The System assigned LP&L the responsibility to build Waterford 3 and MP&L the task of con-

structing Grand Gulf. Subsequently, when MP&L was unable to finance Grand Gulf, MSE was created to own and finance the unit. (App. 394a-95a; 419a; 233a-34a; 17a).

3. *System cost sharing.* Pursuant to System Agreements filed with the FPC and FERC, the MSU companies provided for sharing the costs of generating units planned for the System. The provisions for "capacity equalization" required that each company be responsible for a share of System generating capacity proportionate to its share of the System load. Thus, for instance, if a company had 30 per cent of the System load, it was required to bear responsibility for 30 per cent of the total kilowatts of System generating capacity. The "short" companies—those owning less than their proportionate shares of System generating capacity—made capacity equalization payments to the "long" companies. Thus, the System Agreements effectively reallocated the cost responsibility for generating units among the operating companies. (App. 388a-91a; 238a-39a; 11a-12a).

The 1951, 1973 and 1982 agreements all provided for each company to be responsible for its proportionate share of System generating capability, but the mechanisms for pricing the capacity have changed. Under the 1951 System Agreement a fixed dollar payment per kilowatt was made by the "short" companies to the "long" companies. The 1973 System Agreement reassigned capacity by requiring the "short" companies to pay a portion of the costs of a "participation unit," for which they received an entitlement to a proportionate share of the energy from the unit.

Both the 1951 and 1973 System Agreements achieved a rough equalization of System generation costs. The 1951

System Agreement worked because the average cost per kilowatt of capacity for each company was about the same. The capacity costs of the "participation units" under the 1973 System Agreement were sometimes more expensive than those of other units on the System, but fuel savings made the total costs comparable, so that the 1973 agreement also achieved a rough cost equalization. (App. 357a-58a, 411a-12a).

The 1982 System Agreement continues the historic pattern of "equalizing" generating capacity on a kilowatt-for-kilowatt basis, with each company responsible for its proportionate share of System kilowatts. The price paid per kilowatt is now based on the average cost of the oil and gas units owned by the "long" companies. Given the huge capacity costs of Waterford 3 and Grand Gulf, which are not offset by fuel savings, the concept of kilowatt-for-kilowatt equalization does not achieve cost equalization. Waterford 3 and Grand Gulf represent more than 70 per cent of the System's investment in generation facilities, but provide only about 13 per cent of System capacity. LP&L bore the *entire* cost of Waterford 3, yet is "short" of its proportionate share of kilowatts, and is required to make capacity equalization payments to other companies. To compound this problem, MSU in the UPSA proposed to allocate 38.57 per cent of the Grand Gulf to LP&L. The UPSA would have allocated 31.63 per cent of the unit to MP&L, 29.8 per cent to NOPSI, and *none* to AP&L. (App. 14a-16a; *see* App. 443a-44a; App. 19a n.27).

4. *Creation of MSE.* Like all major generating units in the MSU System, Grand Gulf was planned primarily to meet the needs of the System as a whole. The unit was originally assigned to MP&L, but financing pressure

forced the System to create MSE as a vehicle to finance it. MSE was incorporated in Arkansas. Its board is composed of the chief executive officers of the System. (App. 181a, 17a; Ct. App. Jt. App. 228; App. 289a).

All of the operating companies placed their credit support behind the Grand Gulf project and signed agreements obligating themselves for Grand Gulf costs. Initially, MSU was uncertain how Grand Gulf would be allocated, but anticipated that it might be allocated using the System Agreement. A number of allocation plans were considered by the System Operating Committee. In 1980, the MSS board of directors, consisting of all the System chief executive officers, adopted an allocation different from any proposed by the Operating Committee. AP&L was excused from purchasing any portion of Grand Gulf. According to an internal MSU memorandum, "[p]olitical and regulatory pressures" led AP&L to withdraw from the project. (App. 427a; 398a; 398a-99a; Ct. App. Jt. App. 676).

In 1981, the operating companies formalized the new allocation in a "reallocation agreement." AP&L was a party to the reallocation agreement. AP&L is also a party to the Unit Power Sales Agreement. As the administrative law judge in the Grand Gulf case found, "AP&L has been and is an active party and participant in the contracts and in the whole contractual process surrounding Grand Gulf to the same degree as LP&L, NOPSI and MP&L." (App. 428a).

5. *Decisions of the FERC and court of appeals.* The FERC approved the 1982 System Agreement, but reallocated Grand Gulf to equalize the nuclear investment cost

responsibility among the operating companies. It determined that, to achieve nondiscriminatory rates, the elimination of nuclear investment cost disparities was necessary. The FERC found that the 1982 System Agreement, in conjunction with the reallocation of Grand Gulf, would achieve a proper cost allocation on the System by preserving the historic pattern of rough cost equalization. This decision was initially affirmed by the court of appeals, but on rehearing was vacated and the case remanded for a better explanation of the reasons for employing this remedy. (App. 191a; 81a; 79a; Supp. App. 15a).

The jurisdictional contentions of the Arkansas-Missouri parties were rejected by the administrative law judge in the Grand Gulf case. (App. 427a-38a). As he noted, these arguments rested on an unfounded attempt "to depict AP&L as an independent utility which has expressly limited its involvement in the Unit Power Sales Agreement . . . ." (App. 427a). These assertions were also rejected by the administrative law judge in the case involving the 1982 System Agreement. (App. 299a-320a). The FERC rejected the jurisdictional arguments (App. 167a-72a).

In a thorough and unanimous analysis, the court of appeals set forth the affirmative basis for the Commission's jurisdiction and rejected each of the arguments raised by the Arkansas-Missouri parties. (App. 32a-61a). It found that the jurisdiction of the FERC over wholesale rates necessarily includes jurisdiction over generation costs, which comprise by far the largest component of wholesale rates. (App. 33a-35a). The court of appeals reviewed consistent precedents supporting its determination that the allocation of generation costs among affiliated

companies is subject to FERC jurisdiction, including this Court's decision in *Nantahala Power & Light Co. v. Thornburg,* 106 S.Ct. 2349 (1986). (App. 35a-38a, 44a-46a). It found that FERC jurisdiction in this context has additional merit because state regulatory agencies may act primarily to further their parochial concerns. (App. 51a-52a).

REASONS FOR DENYING THE WRIT

The 1982 System Agreement and the UPSA are contracts for the wholesale exchange of electric power and energy in interstate commerce among affiliates operating an integrated electric system. These interstate transactions are subject to the wholesale rate jurisdiction of the FERC, which includes jurisdiction over the costs associated with generating facilities. The FERC has regulated generation costs in wholesale rates and has allocated generation costs among the MSU companies for decades. The scope of FERC authority was recently confirmed by this court in *Nantahala Power & Light Co. v. Thornburg,* 106 S.Ct. 2349 (1986).

The objections to FERC jurisdiction are meritless. No basis exists for the contention that the FERC cannot require AP&L to purchase a share of Grand Gulf 1. Taken to its logical conclusion, this argument would prevent the FERC from ever modifying agreements among affiliates to reallocate generating costs, although this power is essential to ensure just, reasonable and nondiscriminatory rates. Moreover, the reallocation of Grand Gulf 1 costs does not improperly invade the jurisdiction of the states. These costs are treated like any other wholesale costs for

retail ratemaking; "prudence" issues and other ratemaking issues can and should be litigated at the FERC. Further, the exercise of FERC jurisdiction does not conflict with the Public Utilities Holding Company Act. This Act supports the exercise of FERC power over transactions that cannot be reached by local regulators.

1. The Federal Power Act provides jurisdiction to the FERC over 1) the interstate transmission of electric energy and 2) "the sale of electric energy at wholesale in interstate commerce," which means "a sale of electric energy to any person for resale." 16 U.S.C. § 824(b)(1), (d). This authority includes the power to regulate generation costs in setting wholesale rates. As this Court stated in *Federal Pow. Com'n v. Southern California Edison Corp.*, 376 U.S. 205 (1964), where it upheld the exercise of jurisdiction over a wholesale transaction, the Act makes the Commission's "jurisdiction plenary and extend[s] it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States." *Id.* at 216.

The statutory exception of jurisdiction over generating facilities does not apply to the costs of generating facilities used to make wholesale sales. The exception is not in the sentence providing jurisdiction over interstate electric transmission and wholesale sales, but in the sentence granting jurisdiction over facilities. *See* 16 U.S.C. § 824(b)(1). Thus, the exception generally may prevent the FERC from regulating the *construction* of generating units, but not from regulating, adjusting or allocating generation costs in setting *rates* for wholesale sales. Further, the exception itself contains an exception, permitting the exercise of

jurisdiction as "specifically provided in this subchapter and subchapter III." 16 U.S.C. § 824(b)(1). The subchapter specifically permits the regulation of wholesale sales and all rates, charges, classifications and service associated with those sales. 16 U.S.C. § 824(b)(1), § 824d. Moreover, the nondiscrimination provision prohibits unreasonable differences in "rates, charges, service, *facilities*, or in any other respect," with respect to wholesale sales. 16 U.S.C. § 824d(b)(2) (emphasis added). These provisions grant the FERC plenary jurisdiction over wholesale sales in interstate commerce. The argument of the Arkansas-Missouri parties—to exclude generation costs from FERC jurisdiction—would eviscerate the authority of the FERC and roll back decades of practice and precedent.

The FERC typically exercises rate jurisdiction over all facilities used in connection with wholesale sales, including generating facilities. Indeed, the FERC actually requires a division of the retail and wholesale portions of generating plant and other plant in connection with many wholesale sales. It may use different allocation methods in separating this plant. *See* 18 C.F.R. §§ 35.13(h)(4)(iii), (h)(29), (h)(36). If the FERC could assert jurisdiction only over transmission facilities, it could regulate only a small portion of the costs of wholesale transactions.

The FERC traditionally has exercised jurisdiction over generation costs of the MSU System. The capability equalization provisions of the 1951, 1973 and 1982 System Agreements allocated generation costs, which constituted the biggest portion of System wholesale costs. The jurisdiction of the FERC to regulate these transactions never previously was questioned. Indeed, in 1982 the Fifth

Circuit affirmed a FERC decision approving amendments to the provisions allocating costs for generating capability and transmission investment. *Louisiana Pub. Serv. Com'n v. F.E.R.C.*, 688 F.2d 357 (5th Cir. 1982). In doing so, the court implicitly upheld the exercise of FERC jurisdiction. *Id.* at 358. Further, although the 1982 System Agreement reallocates the costs of generating facilities owned by the companies, the Arkansas-Missouri parties did not object to that exercise of jurisdiction over generating costs. They supported the agreement before the FERC, perhaps because AP&L is a "long" company and receives capacity equalization payments. (*See* App. 282a).

The exercise of jurisdiction over generating plants when they are used for wholesale electric sales is supported by the precedents. In an early case, *Hartford Elec. Light Co. v. Federal Pow. Com'n*, 131 F.2d 953 (2d Cir. 1942), the Second Circuit held that generating facilities used for wholesale sales were subject to FPC jurisdiction, and also offered a very restrictive interpretation of the "but" clause in Section 201(b) of the Act, which creates the exception for generating facilities. *Id.* at 962. Subsequently, in *Connecticut Light & Pow. Co. v. Federal Pow. Com'n*, 324 U.S. 515 (1945), this Court questioned the interpretation of the "but" clause, but appeared to approve the alternative jurisdictional ruling that where "the generating facilities were used as facilities for interstate wholesale sales, [they] therefore were within § 201(b)." *Id.* at 528 n.6.

Arguments very similar to those of the Arkansas-Missouri parties were considered and rejected in the Northern States Power cases. In *State of Minnesota v.*

F.E.R.C., 734 F.2d 1286 (8th Cir. 1984), the petitioner argued that the Northern States Power cost allocation agreement, which equalized generation and other costs among affiliated companies, was not a wholesale rate. The court rejected this argument, holding that the agreement established terms relating to interstate electric sales. *Id.* at 1288. In another case, the FERC allocated the costs of an abandoned nuclear plant among the affiliated companies. The costs were equalized in proportion to the average peak demands of the Northern States affiliates. The court affirmed the ruling over the objections of two state commissions. *South Dakota Pub. Util. Com'n v. F.E.R.C.*, 690 F.2d 674 (8th Cir. 1982). Additionally, two state courts held that the FERC ruling concerning the abandoned generating plant was preemptive because of the exclusive FERC jurisdiction over wholesale rates. *Northern States Pow. Co. v. Hagen*, 314 N.W.2d 32, 37 (N.D. 1981); *Northern States Pow. Co. v. Minnesota Pub. Util. Com'n*, 344 N.W.2d 374, 378, 382 (Minn. 1984).

The court of appeals also had ample precedent in its circuit for approving the exercise of FERC jurisdiction. In *Municipalities of Groton v. Federal Energy Reg. Com'n*, 587 F.2d 1296 (D.C. Cir. 1978), the court determined that the FERC has jurisdiction to adjust payments for generating deficiencies in a power pool. *Id.* at 1302. In *Mid-Tex. Elec. Co-Op, Inc. v. F.E.R.C.*, 773 F.2d 327 (D.C. Cir. 1985), the court went a step further, holding that the FERC has jurisdiction to include generating plant *construction work* in the costs used to fix wholesale rates. *Id.* at 344.

The scope of FERC jurisdiction was recently confirmed by this Court's ruling in *Nantahala Power & Light*

Co. v. Thornburg, 106 S.Ct. 2349 (1986). In *Nantahala*, the Court determined that where the FERC had established a utility's access to power entitlements in setting wholesale rates, a state agency could not adjust the entitlements differently in establishing retail rates. The Court recognized the exclusive authority of the FERC to regulate wholesale electric costs, which included the cost of generating the electricity. *See* 106 S.Ct. at 2359.

The Arkansas industrial parties seek to distinguish *Nantahala* by contending that the Court decided nothing about FERC jurisdiction, but only that a state may not engage in a collateral attack on a FERC decision that is properly made. (Pet. of Reynolds Metals Co., *et al.* at 20). But the implicit basis of the Court's ruling was that the FERC acted within its jurisdiction, because the doctrine of federal preemption requires a Congressional purpose to displace conflicting state law. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 229-30 (1947). The Court necessarily determined that the FERC properly exercised its jurisdiction or it could not have found that state authority was displaced.

The Arkansas public parties argue that *Nantahala* is distinguishable because it involved purchased power costs rather than the costs of a specific generating unit. (Pet. of Arkansas Pub. Serv. Com'n, *et al.* at 18-19). Apparently, these parties contend that the FERC may allocate the costs of many generating units lumped together, but may not allocate the costs of a single generating unit. This argument embodies an inverted and illogical view of the jurisdictional exception for generating facilities.

The jurisdictional ruling of the FERC and court of appeals is supported by decades of practice, the decisions

of this Court, and many other precedents. No basis exists to grant plenary review of the decision.

2. The Arkansas parties also attack the power of the FERC to reallocate Grand Gulf 1. They argue that the FERC cannot "force" a purchase or sale of electricity. Since these parties supported the UPSA and 1982 System Agreement as filed, they apparently contend that the FERC can *accept* an agreement among affiliates for the allocation of wholesale generation costs, but it may not reallocate the costs to avoid discrimination. (*See* App. 282a, 162a). This contention is meritless.

If the "forced" sale or "forced" purchase arguments had merit, the FERC could not make any adjustments to agreements for sharing costs among affiliated companies. An adjustment to a method for allocating capability responsibility in the MSU System, for instance, would be objectionable because it might make a "long" company "short" and require the purchase of additional megawatts. A "forced" sale or purchase would result from a decision to change the type of generating unit used to compute costs under the tariff. In a typical wholesale transaction, a change in the method of separating jurisdictional costs might require wholesale purchasers to pay for additional megawatts of capacity, causing a "forced" purchase. Were the Court to deny the FERC its power to require a "forced" sale or purchase that really is a fair reallocation of costs, it would repudiate the ratemaking jurisdiction granted in the Federal Power Act.

In this case, the FERC made an adjustment to the 1982 System Agreement that changed the capacity credits given the companies for firm purchases. (App. 207a-08a).

This adjustment had the effect of changing the responsibilities of individual companies for megawatts of System capacity from that specified in their agreement. Although this adjustment fits the Arkansas definition of a "forced" sale or purchase, the Arkansas parties do not even mention it in their petitions. Obviously, they believe the FERC had the power to make the adjustment.

The arguments of the Arkansas parties conflict with explicit language of the Federal Power Act. The statute not only empowers the FERC to disapprove unjust or discriminatory contracts, but to establish terms that are just and reasonable. Section 206(a) provides that the FERC, after finding a contract unreasonable, must "determine the just and reasonable . . . contract to be thereafter observed and in force, and shall fix the same by order." 16 U.S.C. § 824e(a). This provision is inconsistent with a "rubber stamp" theory.

The contentions of these parties are also flawed because they depend on a view that the MSU operating companies are separate, independent entities, which bargain at arms' length. (Pet. of AP&L at 2-3; Pet. of Reynolds Metals Co. at 18-19). Here, the MSU companies are part of a holding company system, operate their electric plants as a single integrated system, and allocate their generation and transmission costs pursuant to wholesale contracts. The FERC decision allocates these wholesale costs among the companies just as prior rulings did for decades.

The "forced purchase" arguments are also erroneous because the Grand Gulf plant was a System project involving all the operating companies, including AP&L; the UPSA is not an arms' length purchase agreement.

AP&L was fully involved in the decisions relating to Grand Gulf. Moreover, AP&L was a party to all of the agreements to finance and allocate Grand Gulf. (App. 427a-28a; 398a). Further, the reallocation agreement, which purports to relieve AP&L of cost responsibility for Grand Gulf, was conditioned on regulatory approval by the FERC. (*Id.*). The continuing and active role of AP&L in planning, financing and completing Grand Gulf precludes the view that it should escape responsibility for the cost of the unit.

3. The argument that the reallocation of Grand Gulf 1 costs is an undue intrusion into retail ratemaking is meritless. All wholesale sales are sales for resale; the cost to the purchaser necessarily becomes a component of rates to ultimate consumers. The MSU System Agreement for decades has reallocated generation costs among the companies and these costs were reflected in retail rates. The Arkansas parties did not complain when most of the up-front costs of White Bluff 1 & 2—two coal units owned by AP&L—were absorbed by Louisiana ratepayers pursuant to the 1973 System Agreement. Nor did they challenge the transfer of these costs pursuant to a temporary UPSA in the 1982 System Agreement. (*See* R., Docket ER82-483, tr. 1212-14). Their view of the intrusive effect of FERC jurisdiction apparently depends on whether AP&L incurs net benefits or costs under the FERC tariff.

Nor is it accurate to contend that the exercise of FERC jurisdiction creates a regulatory "gap" in reviewing the prudence of utility decisions. The FERC can and should determine the prudence issue; it is subsumed in the determination that rates are just and reasonable. The

FERC recently recognized that it has jurisdiction to decide the prudence issue in a case involving an UPSA executed by holding company affiliates. *AEP Generating Co.*, 38 FERC ¶ 61,243 (1987). Moreover, in this case the FERC did effectively determine the prudence-of-purchase issue when it decided on a reasonable and nondiscriminatory allocation of Grand Gulf.

In addition, the FERC decision does not alter state regulatory control over the construction decisions of utilities. Each state must make decisions regarding the certification of generating units, based on the needs of the MSU System and the individual companies. The Arkansas Commission—which portrays itself as ever-diligent—was content for decades when AP&L had inadequate capacity and depended on generators in Louisiana. Its newfound desire for stand-alone status results entirely from an unwillingness to pay unexpected costs associated with System planning.

None of the state regulatory agencies have ever certificated generating units in other states, although the costs of those units typically were transferred among states pursuant to the System Agreement. None of the regulatory commissions—other than the Mississippi Commission—had the opportunity to approve the construction of Grand Gulf. None of the operating companies have a need or desire to absorb Grand Gulf costs, but someone must pay these costs if MSU is to avoid bankruptcy. The FERC role is—as it always has been—to achieve a fair and nondiscriminatory distribution of these costs.

4. The Arkansas public parties contend that wholesale jurisdiction vanishes when the FERC recognizes the

"single System" operation of the MSU companies. (Pet. at 20-21). This contention is invalid. It is similar to the argument made, and rejected, in *State of Minnesota v. F.E.R.C.*, where System generation costs were equalized among affiliated companies. Moreover, the sales among the MSU affiliates are sales for resale regardless of the factors considered in allocating costs. Furthermore, these sales are beyond the reach of State regulators. Accepting the "no sale" argument would establish a regulatory "gap" for affiliated company power pools.

5. The Arkansas parties also rely on the Public Utility Holding Company Act, but their assertions stand reason on its head. The Arkansas public parties recognize, for instance, that the Act was designed to control monolithic corporations and prevent corporate manipulation of subsidiaries in various jurisdictions. (Pet. at 21). Yet the conclusion drawn by the Arkansas parties, that the FERC should adopt a hands-off stance in regulating MSU, is completely inconsistent with this goal. The FERC can prevent discrimination resulting from intercorporate transactions only if it exercises its regulatory power to prevent rate discrimination. The States cannot regulate wholesale sales and might well adopt protectionist positions if they could assert this jurisdiction.

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CONCLUSION

The jurisdiction of the FERC over wholesale electric transactions includes the power to reallocate the costs of Grand Gulf. Generating costs make up the vast majority

of wholesale electric costs and the FERC has exercised jurisdiction over these costs for decades. The arguments of the Arkansas-Missouri parties conflict with the historic regulation of the MSU System by the FERC, the decisions of this Court, and decades of precedent. Moreover, these arguments rely heavily on a false portrayal of AP&L as a separate, independent entity, which planned its own generating resources apart from the System. The ruling of the court of appeals is firmly grounded in the facts and the law. No reason exists to grant certiorari.

Respectfully submitted,

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Nos. 86-1380, 86-1424, and 87-469

In the Supreme Court of the United States

OCTOBER TERM, 1987

ARKANSAS PUBLIC SERVICE COMMISSION, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ARKANSAS POWER AND LIGHT COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

REYNOLDS METALS COMPANY, ET AL., PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission had jurisdiction under Part II of the Federal Power Act, 16 U.S.C. (& Supp. IV) 824 *et seq.*, to reallocate the capacity of an electric power generating facility among four wholly-owned subsidiaries of an integrated public utility holding company, where the four subsidiaries operate as an interstate power pool and the system decided to build the facility to serve its overall needs.

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-96a) is reported at 808 F.2d 1525.[1] A subsequent order on re-

[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 86-1380.

hearing remanding the case for reconsideration of two issues not involved here is reported at 822 F.2d 1104. The orders of the Federal Energy Regulatory Commission (Pet. App. 141a-222a, 97a-140a) are reported at 32 F.E.R.C. ¶ 61,425 and 31 F.E.R.C. ¶ 61,305.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1987. On April 3, 1987, the court of appeals granted rehearing en banc (86-1380 Supp. Br. App. SA-1 to SA-2). On June 24, 1987, the court vacated its grant of rehearing en banc (86-1380 Supp. Br. App. SA-3 to SA-4). On the same day, the panel granted rehearing and vacated a portion of its opinion and judgment of January 6, 1987 (86-1380 Supp. Br. App. SA-5 to SA-6). The petitions in Nos. 86-1380, 86-1424, and 87-469 were filed on February 20, 1987, March 4, 1987, and September 22, 1987, respectively. On September 3, 1987, the court of appeals denied a further petition for rehearing and rehearing en banc filed by certain petitioners (86-1380 Supp. Br. App. SA-7 to SA-10). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Arkansas Power & Light Co. (AP&L), and respondents Louisiana Power & Light Co. (LP&L), Mississippi Power & Light Co. (MP&L), and New Orleans Public Service, Inc. (NOPSI) are all wholly-owned subsidiaries of Middle South Utilities, Inc. (MSU), a public utility holding company established in 1949 under Title I of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79 *et seq*. The four subsidiaries operate as a highly integrated electric power pool (Pet. App. 33a, 37a, 44a). They sell and exchange electricity at wholesale across state lines, to each other as well as to outside companies, and

they also sell electricity at retail in separate service areas in five states. All electricity on the Middle South system is centrally dispatched from the system's dispatch center at Pine Bluff, Arkansas. *Id.* at 288a-292a, 378a.

A systemwide Operating Committee has historically coordinated the planning of new generating capacity for the system and has attempted to equalize the costs of additional capacity among the four operating companies (Pet. App. 10a-13a).[2] Until the late 1960s, the MSU system added new generating units in the southern part of the system to take advantage of cheap oil and gas reserves in that area (*id.* at 13a). The system has since sought to meet projected increases in demand and to diversify its fuel base by adding coal and nuclear generating units (*ibid.*). The Operating Committee has made the major decisions concerning timing, location, and size of additional capacity, based on its assessment of systemwide needs and objectives (*id.* at 181a-182a). In an effort to equalize costs and promote economies of scale, the Operating Committee has, in effect, rotated the responsibility for financing, building, and operating these new generation units among the four operating companies (*id.* at 183a-189a, 190a-191a; see also *id.* at 13a-19a). The Operating Committee has, to that end, "assigned" to each operating company at least one nuclear unit (*id.* at 190a-191a).[3] The

[2] The system Operating Committee has five members, consisting of one representative from the holding company and one from each operating company (Pet. App. 10a).

[3] Various parties in the administrative proceedings disputed the contention that the Operating Committee "assigned" new generation units to operating companies and claimed that the companies had instead "volunteered" to finance and construct the units (Pet. App. 181a-182a). FERC ultimately determined that "[w]hether units were 'volunteered' for or 'assigned' is not so relevant as the fact that operating companies ended up with responsibility for the units only where all the system companies, jointly acting as the System Operating Committee, concurred that this was in the best interests of the system as a whole" (*id.* at 182a).

Committee assigned to AP&L the responsibility for financing and construction of the first two nuclear units, ANO 1 and 2, which were built in the early 1970s, and thereafter assigned nuclear units to the other three operating companies (*id.* at 13a-14a, 184a-187a, 394a-397a).

In July 1971, the Operating Committee decided that Grand Gulf would be built and that Units Nos. 1 and 2 would come on line in 1979 and 1980, respectively. Under the original plan, MP&L was assigned responsibility for financing and constructing Grand Gulf Unit No. 1 (Grand Gulf 1), and NOPSI was assigned responsibility for financing and constructing Grand Gulf Unit No. 2 (Grand Gulf 2). Responsibility for construction of both units, however, soon shifted to MP&L because of siting problems within NOPSI's jurisdiction. When it subsequently became apparent that MP&L could not finance the construction, MSU made a system decision in 1974 to form a generation subsidiary, Middle South Energy (MSE) (now Systems Energy Resources, Inc.), to be the vehicle for financing the project. MSE acquired from MP&L all of its right, title, and interest in the Grand Gulf project. Pet. App. 16a-17a, 294a-296a, 396a-398a.

By the late 1970s, it became evident that Grand Gulf's capacity would not be needed immediately to meet demand, which was lower than predicted in earlier forecasts (Pet. App. 396a-397a). MSU continued to build Grand Gulf 1 and 2 on the assumption that, because of the relatively low cost of nuclear fuel, the overall cost (fixed plus variable) per kilowatt hour would be less than that of alternative energy sources and that, upon completion, MSE would sell the plants' capacity at wholesale to each of the four operating companies, in amounts to be determined later (*id.* at 398a-400a). All four operating com-

panies provided credit support to enable MSE to receive financing, and each remains liable for an agreed percentage of Grand Gulf costs (*id.* at 397a-398a).

The investment cost of Grand Gulf 1 and 2 continued to increase dramatically because of regulatory delay, additional construction requirements, inflation, and increased financing costs. As a result, although the investment cost of the two Grand Gulf units combined had been projected to be $1.2 billion, the investment cost of Grand Gulf 1 alone was approximately $3 billion upon its completion; construction of Grand Gulf 2 was suspended. The investment and other fixed costs associated with Grand Gulf 1 are substantially higher per kilowatt than the costs of other power generated by the MSU system (with the exception of one other nuclear plant). Although fuel costs are lower for Grand Gulf 1 than for most nonnuclear system power sources, the overall cost per kilowatt hour is higher for Grand Gulf 1 than for other system sources because of its much higher investment costs. Because AP&L completed construction of both of its nuclear units, ANO 1 and 2, by 1980, its overall cost per kilowatt hour for these plants is much lower. Pet. App. 14a-15a, 146a n.2, 233a, 396a-401a.

Transactions among the operating companies in the Middle South system, including the sale and exchange of capacity and energy, have been governed by a series of "System Agreements" filed with FERC. These agreements have provided the contractual basis for planning and operating the companies' generating units on a single-system basis; they have also provided mechanisms for equalizing cost imbalances among the four companies that result from the system's method of planning and operating the units. Pet. App. 151a. In 1982, Middle South Companies filed with FERC the 1982 System Agreement, which set forth the terms and conditions for transactions among the four operating companies (except the sale of

power from Grand Gulf), and a Unit Power Sales Agreement (UPSA), which established wholesale rates for MSE's sale of capacity in Grand Gulf 1 (with an entitlement to the associated power) to the operating companies (*id.* at 19a). The 1982 System Agreement, like prior versions, established a scheme of "capacity equalization payments" designed to ensure that each company contributes proportionately to the total cost of generating power on the System.[4] The UPSA obliged the four operating companies to purchase the following specified percentages of Grand Gulf capacity: LP&L, 38.57%; MP&L, 31.63%; NOPSI, 29.80%; and AP&L, 0% (*id.* at 147a).[5]

2. Under Part II of the Federal Power Act, 16 U.S.C. (& Supp. IV) 824 *et seq.*, the Commission is responsible for ensuring that all rates or charges, made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy in interstate commerce, as well as all rules, regulations, practices, and contracts affecting those rates or charges, are just and reasonable (see 16 U.S.C. 824d(a)). FERC assigned the 1982 System Agreement and the UPSA to two different

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[4] These payments are intended to compensate for the imbalances created by the system's rotational scheme of adding capacity: the last company to add capacity would, because the plant is sized for system needs, typically have contributed more than its share of costs. While the method of computing the amounts of these payments has been different in different System Agreements, the overall result has been that each company contributes to the total costs of generating power on the system roughly in proportion to its share of the overall demand for electricity of the system. Pet. App. 10a-16a, 151a-153a, 357a-358a, 391a-392a.

[5] The allocation of Grand Gulf 1 distributes among the four companies the "capacity" of the plant (that is, the capacity to produce a certain amount of electricity), the entitlements to whatever energy is produced from that capacity, and the costs of both the capacity (the up-front "investment" costs of constructing the plant and other fixed costs) and the energy (including fuel and other variable costs).

administrative law judges for review. After administrative hearings, the judges concluded that the agreements, as filed, were not just and reasonable, and were unduly discriminatory because they allowed AP&L to avoid any financial responsibility for the costs associated with Grand Gulf 1 (Pet. App. 367a, 414a).

FERC reviewed these initial decisions, rendered in February 1984 (Pet. App. 374a-526a) and February 1985 (*id.* at 223a-373a), and issued its decision in June 1985. FERC agreed that the 1982 System Agreement and the UPSA, because they did not allocate a share of Grand Gulf 1 to AP&L, would not result in just and reasonable allocations of costs between the operating companies and "that some form of equalization of nuclear plant costs is necessary to achieve just[,] reasonable, and non-discriminatory rates among the MSU operating companies" (Pet. App. 191a (footnote omitted)). FERC determined that the "most equitable allocation" would be for the operating companies to share in the system's total investment in nuclear capacity (four units, including Grand Gulf 1) "roughly in proportion to each company's share of System demand" (*id.* at 192a). On that basis, FERC ordered the following allocation of Grand Gulf 1 capacity and costs: AP&L, 36%; LP&L, 14%, MP&L, 33%; and NOPSI, 17% (*ibid.*).

In reaching its decision, FERC made two factual findings important to the present issue. First, FERC found that neither Grand Gulf 1, nor any one operating company, could be viewed in isolation: "the Middle South companies constitute a highly coordinated integrated electric system," which historically has "roughly equalized" generating costs among the four operating companies (Pet. App. 172a, 190a); the system Operating Committee made all "major critical decisions, including decisions to build new generating units, * * * for the benefit of the

system as a whole" (*id.* at 173a);[6] FERC specifically found that Grand Gulf 1 was no exception and had been planned to meet system needs (*id.* at 183a, 189a-191a). Second, FERC found that Grand Gulf 1 was part of a reasonable system plan to diversify the system's fuel base by developing nuclear power to meet anticipated demand (*ibid.*).

FERC rejected contentions advanced by several parties, including petitioners, that FERC lacked jurisdiction to reallocate the costs of Grand Gulf 1 among the four operating companies (Pet. App. 167a-170a). The Commission agreed with the two administrative law judges (*id.* at 306a-313a, 427a-439a) that neither the Federal Power Act provision denying FERC jurisdiction over generating facilities (Section 201(b)(1), 16 U.S.C. 824(b)(1)), nor any limitation on FERC's authority to compel a purchase or sale of power, precludes FERC's jurisdiction to reallocate the costs of Grand Gulf 1. The Commission noted "that the issue here is not whether a company should be forced to purchase or sell power, but rather is the appropriate allocation of costs among integrated companies owned by the same parent" (Pet. App. 169a). With respect to AP&L, in particular, the Commission "reject[ed] any assertion * * * that AP&L has had no involvement in the Grand Gulf unit * * *. AP&L has been continuously involved in the system decisions regarding Grand Gulf and MSE" (*id.* at 169a-170a). Finally, FERC likewise rejected (*id.* at 171a-172a) claims that its allocation order unduly impinged on state authority and was inconsistent with the Public Utility Holding Company Act of 1935, 15 U.S.C. 79 *et seq.*

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[6] The individual operating company responsible for a particular unit decided only subsidiary matters, such as the precise size or location of the unit, within the general guidelines set out by the system Operating Committee (Pet. App. 181a-182a; see also *id.* at 118a).

In subsequently denying several requests for rehearing, FERC further elaborated on the statutory basis for its authority to reallocate the capacity of Grand Gulf 1 among the four operating companies (Pet. App. 99a-113a). The Commission reiterated that it has "jurisdiction under Section 201 over the 1982 System Agreement because the agreement involves sales of electric energy at wholesale in interstate commerce" (Pet. App. 105a). The Commission also noted that the contrary view "would permit companies engaging in wholesale sales in interstate commerce to avoid the intended Federal regulation in Section 201(a) by forming a generation-only subsidiary to engage in the wholesale sales which otherwise would come under our jurisdiction" (Pet. App. 106a). Finally, the Commission stressed that, contrary to the premise underlying these jurisdictional challenges, AP&L is a "component part[]" of a highly integrated holding company system, whose interests must be "subsumed by the greater interests of the entire System" (*id.* at 129a).

3. On petition for review of FERC's orders, the court of appeals affirmed FERC's determination that it had jurisdiction to reallocate the capacity of Grand Gulf 1 among the four operating companies upon a finding that the two agreements as filed were unduly discriminatory (Pet. App. 1a-93a). On rehearing, however, the court vacated FERC's specific reallocation, remanding to FERC for a fuller explanation.[7]

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[7] On April 3, 1987, the panel had initially denied rehearing and the court of appeals had granted rehearing en banc to consider the terms of FERC's allocation (814 F.2d 773; 86-1380 Supp. Br. App. SA-1 to SA-2). On June 24, 1987, the court of appeals issued two orders. In the first, the court, sitting en banc, vacated its prior order setting the case for rehearing en banc and reinstated the portions of the opinion and judgment it had earlier vacated (86-1380 Supp. Br. App. SA-3 to SA-4). In the second, the panel vacated its earlier order denying the petitions for rehearing, granted the petitions, and reversed a portion of its opinion and judgment of January 6, 1987, concerning FERC's

The court concluded that "[t]he combined force of [Sections 201, 205 and 206, 16 U.S.C. 824, 824d, 824e] leads inexorably to the conclusion that, under the circumstances presented in the instant case, FERC had jurisdiction to modify the Grand Gulf allocation set forth in the UPSA" (Pet. App. 33a). "When, as here, generation capacity has been built and planned on a profoundly integrated basis, the Commission properly may examine its allocation as a cost component affecting wholesale rates" (*ibid.*). The court stressed that "[u]nreasonable disparities in the shares borne by affiliates of the total costs of the system's generating capacity plainly 'affect' the wholesale rates at which the operating companies exchange energy, and therefore require remedial action by the Commission pursuant to section 206" (*id.* at 35a). Finally, the court rejected petitioners' claims that FERC has unlawfully exercised jurisdiction over a generating facility, unlawfully compelled the purchase of generating capacity, impermissibly intruded on state jurisdiction, and taken action inconsistent with the Public Utility Holding Company Act (*id.* at 39a-57a).

ARGUMENT

Petitioners contend that the Commission lacked jurisdiction under the Federal Power Act to determine the just and reasonable allocation of Grand Gulf 1 capacity and costs among the four operating companies of the MSU system. The court of appeals' rejection of that claim

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allocation (*id.* at SA-5 to SA-6). In accordance with Judge Bork's partial dissent to the original panel opinion (Pet. App. 94a-96a), the remand is for FERC's "reconsideration of the decision to equalize the capacity costs of all nuclear plants, and for an explanation of the criteria used to determine what constitutes 'undue discrimination' and of why [FERC's] ultimate decision is not unduly discriminatory" (86-1380 Supp. Br. App. SA-6).

was plainly correct and is consistent with all pertinent decisions of this Court and other courts of appeals. Further review is not warranted.[8]

1. Section 206(a) of the Federal Power Act, 16 U.S.C 824e(a) (emphasis added), provides that whenever the Commission finds that any "contract *affect[ing]* [any] rate, charge, or classification [demanded, observed or collected by any public utility for any sale subject to the jurisdiction of the Commission] is unjust, unreasonable, [or] unduly discriminatory," the Commission shall "determine the just and reasonable * * * contract to be thereafter observed and in force, and shall fix the same by order." The Commission's jurisdiction to order a specific allocation of Grand Gulf 1 capacity and costs is squarely based on that specific directive: the contract provisions in question "affect" the four operating companies' "charges" to each other, as well as to public customers, in interstate wholesale transactions.

The four operating companies and MSE are all "public utilities." Each of them both produces and sells electric power at wholesale in interstate commerce: the four operating companies share the system's "capacity" and make "equalization payments" designed to align each company's share of the cost of total system capacity with its share of the demand for the system's energy (see Pet. App. 10a-12a); in addition, the four operating companies sell energy to each other, with the buyer always assumed to buy the lowest cost energy available in the pool after the

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[8] The court of appeals remanded to the Commission for further proceedings (see note 7, *supra*). The interlocutory posture of this case may itself justify denial of certiorari. However, because of the relationship between this case and *Mississippi Power & Light Co.* v. *State of Mississippi*, No. 86-1970, which is currently pending before the Court on the merits (see note 21, *infra*), we explain more fully why the decision below is correct and why the case does not present any issue that warrants this Court's consideration.

needs of the producer of that energy have been served (see *id.* at 11a & n.7); in addition, each of the four operating companies sells energy at wholesale to public customers (*id.* at 378a).

As the court of appeals said, although the provisions of the UPSA that allocate the capacity and costs of Grand Gulf "do not fix wholesale rates, their terms do directly and significantly *affect* the wholesale rates at which the operating companies exchange energy, due to the highly integrated nature of the MSU system" (Pet. App. 37a (emphasis in original)). The assignment of a specified amount of Grand Gulf 1 capacity to a particular operating company obviously affects both its obligation to pay (or right to receive) capacity "equalization payments" from time to time, and its need to buy (or ability to sell) excess power from (or to) other members of the system; in view of the pricing of pool exchanges under the System Agreement, the allocation of Grand Gulf 1 capacity also affects the prices at which such transactions occur.[9] In sum, the provisions the Commission reviewed here are an inseparable part of a set of interrelated agreements that set terms for interstate wholesale transactions between components of the MSU system, and they are exactly what Congress evidently intended to reach by the "contract affect[ing]" clause of Section 206(a).

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[9] The amount of Grand Gulf capacity allocated to an operating company affects the terms on which system power from Grand Gulf is available to that company. For instance, under the UPSA and 1982 System Agreement as originally filed with the Commission, AP&L, although not obliged to pay for any share of Grand Gulf capacity, would have been able to purchase electric energy from Grand Gulf through the system power pool at extremely low prices: under the 1982 System Agreement, prices for power pool transactions reflect variable costs (which for Grand Gulf are very low) and not fixed costs (which for Grand Gulf are very high). The cost of Grand Gulf power to the other operating companies, which were all allocated a percentage of Grand Gulf capacity, would, of course, have been much greater.

Petitioners contend (86-1380 Pet. 10 n.8; 87-469 Pet. 18-19) that the court of appeals' theory would extend the Commission's jurisdiction to labor contracts, construction contracts, and in general any contract that affects a utility's costs and therefore its rates. They are wrong for two reasons. First, the court of appeals affirmed the Commission's jurisdiction over these provisions *not* because they affect the wholesale rates the companies charge in sales to customers, but because they affect the meaning and operation of agreements governing transactions between the operating companies themselves: these provisions "affect rates" not merely in the sense that they tend to cause rates to be higher or lower, but by altering the practical operation of other agreements between the same companies that govern inter-company transactions that concededly *are* subject to FERC's jurisdiction. As the court of appeals said (Pet. App. 37a (emphasis deleted and added)), "the allocation of Grand Gulf capacity and costs * * * significantly affects the wholesale rates at which the operating companies exchange energy [with each other] due to the *combined effect* of the UPSA and the 1982 System Agreement."[10] Second, even as respects the effects on rates charged by a utility to wholesale customers, there is an obvious difference between a contract that merely sets a price to be charged to a utility by a third-party supplier and a contract that allocates a commonly-incurred cost between two utilities. FERC believes that it would have jurisdiction to reform the latter (if unjust) in connec-

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[10] See Pet. App. 111a (footnote omitted) ("[W]e emphasize that the UPSA cannot be viewed in isolation. It is an agreement which 'supplements or supersedes' the coordination arrangements among the MSU utilities, and * * * is a contract 'affecting' rates under the 1982 System Agreement.").

tion with its review of wholesale rates for the two utilities, whether or not the two utilities are otherwise related.[11]

The breadth of FERC's jurisdiction over contracts "affecting" rates and charges was recently reaffirmed by this Court in *Nantahala Power & Light Co.* v. *Thornburg*, No. 85-568 (June 17, 1986). That case involved contracts between two affiliated utilities allocating a limited supply of low-cost power. Commenting on the binding effect of these contracts (as FERC-filed agreements) for state ratemaking purposes, and on the Commission's power to modify the entitlements provided for, the Court said that while the terms of the agreements "do not purport explicitly to set a sales price for power, FERC's decision on how Nantahala may treat these agreements in determining its wholesale rates obviously does *affect* Nantahala's costs directly, and thus Nantahala's wholesale rates" (slip op. 17 (emphasis added)). As the court of appeals said (Pet. App. 38a), this decision provides a "clear and timely message that FERC's jurisdiction under such circumstances is unquestionable."[12] The same rationale has been accepted by every court of appeals to address the issue (see *Appalachian Power Co.* v. *Public Service Comm'n*, 812 F.2d 898 (4th Cir. 1987); *Minnesota* v. *FERC*, 734 F.2d 1286, 1287-1289 (8th Cir. 1984)).

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[11] See Pet. App. 342a-343a. Contrary to the assumption of petitioner Reynolds Metals (87-469 Pet. 17 n.17), the Commission's jurisdiction here does not depend on whether the Commission has a long-standing practice – which it does – of "rolling-in" jointly incurred costs to avoid unduly discriminatory rates.

[12] Neither of petitioners' objections to following *Nantahala* here has merit. First, it is true (see 86-1380 Pet. 19) that in *Nantahala* the Commission had merely set certain wholesale rates and had not altered the agreements themselves. But it was assumed in *Nantahala* that FERC could have altered the agreements, and indeed the case would have been one step easier had it done so: one *problem* in *Nantahala* was that the State was being compelled to honor, in setting Nantahala's retail rates, a reallocation that was not embodied in FERC-altered agreements but only in FERC's determinations for pur-

2. Petitioners claim (86-1380 Pet. 8-10; 86-1424 Pet. 5-7; 87-469 Pet. 21-23) that Section 201(b)(1), which limits the Commission's jurisdiction "over facilities used for the generation of electric energy" (16 U.S.C. 824(b)(1)), deprives the Commission of jurisdiction to reallocate the capacity of Grand Gulf. There are two dispositive answers. First, Section 201(b)(1) provides that "[t]he Commission * * * shall not have jurisdiction, *except as specifically provided* [elsewhere in the Act], over facilities used for the generation of electric energy or over facilities used in local distribution * * *" (16 U.S.C. 824(b)(1) (emphasis added)). Since the provisions in question here are, as explained above, contractual provisions affecting rates and charges for transactions within the Commission's jurisdiction, Section 206 "specifically provided" the Commission with jurisdiction to issue the reallocation order challenged in this case.

Second, the assertion of jurisdiction over contract terms affecting interstate wholesale transactions in the power produced by a particular generating facility simply is not the same as the assertion of jurisdiction over the "generating facility," within the meaning of Section 201(b)(1). That section plainly means to refer to such matters as the size, type, location, and operation of the facility, none of which FERC asserted jurisdiction over. See

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poses of a parallel proceeding setting Nantahala's wholesale rates; the Court solved that problem by noting that the Commission's order in the wholesale case was "for purposes of this case, essentially the same as reformation of the agreement itself" (slip op. 18).

Second, petitioner Reynolds Metals' reliance (87-469 Pet. 21 n.21) on the Commission's own distinction of *Nantahala* is misplaced. The Commission's remarks, which were made prior to this Court's decision in *Nantahala*, were expressly confined to factual distinctions that are relevant only to a legal issue (piercing the corporate veil) not presented by the petitions. See Pet. App. 124a; cf. *id.* at 169a (citing *Nantahala* as authority for the Commission's jurisdiction here).

Pacific Gas & Electric Co. v. *State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 205-206 (1983). Although the Commission's order may affect some matters relating to generation, that, as the court of appeals said (Pet. App. 40a), is simply "the byproduct of a legitimate exercise of FERC's power to regulate wholesale rates" and not regulation of the facility itself.[13]

Nor, contrary to petitioners' claim (86-1380 Pet. 9; 86-1424 Pet. 5, 6; 87-469 Pet. 22-23), does this Court's decision in *Connecticut Light & Power Co.* v. *FPC*, 324 U.S. 515 (1945), suggest otherwise. In *Connecticut Light & Power*, the Court ruled that the Commission had no jurisdiction over the accounting practices of a utility whose facilities were used solely for "local distribution" of out-of-state energy because Section 201(b)(1) exempts "facilities used in local distribution" from the Commission's jurisdiction "except as specifically provided" elsewhere in the Act (16 U.S.C. 824(b)(1)). The reason the Court gave (324 U.S. at 531) was that allowing FERC to assert jurisdiction solely because of the carriage of some out-of-state energy "would nullify the exemption and transfer as a practical matter to Federal jurisdiction the regulation of many local companies that we think Congress intended to leave in state control." The present case, by contrast, involves a fundamentally interstate arrange-

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[13] Contrary to petitioner Reynolds Metals' claim (87-469 Pet. 18-19), the court of appeals' decision is not inconsistent with *FPC* v. *Conway Corp.*, 426 U.S. 271 (1976). In that case, this Court held that FERC should have considered certain matters concededly not within the Commission's jurisdiction in determining whether wholesale rates within the Commission's jurisdiction met applicable federal standards. The issue in this case is whether the allocation of Grand Gulf capacity *is* a matter within the Commission's jurisdiction, an issue on which *Conway* has no bearing.

ment that only FERC can regulate, and there is no danger of swallowing the "generating facilities" exemption, which serves an entirely different purpose.[14] Section 201(a) reveals Congress's understanding that there would be "Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III" (16 U.S.C. 824(a)). And, as the court of appeals said, "[t]he Conference Report on the FPA instructs that the * * * phrase[] [in Section 201] ["except as specifically provided" elsewhere] w[as] 'added to remove any doubt as to the Commission's jurisdiction over facilities used for the generation * * * of electric energy to the extent provided in other sections' " (Pet. App. 40a (quoting H.R. Rep. 1903, 74th Cong., 1st Sess. 74 (1935)).

3. Petitioners claim (86-1380 Pet. 19-20; 86-1424 Pet. 6-7; 87-469 Pet. 15-16, 26-27) that FERC exceeded its authority by "forcing" AP&L to purchase Grand Gulf capacity. But AP&L is not entitled to be treated as if it were a stranger to the system. AP&L participated in the complex set of intra-system arrangements that allocate

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[14] The "local distribution" and "generating facilities" exceptions also differ in a material respect. As this Court stressed in *Connecticut Light & Power*, 324 U.S. at 524, FERC already exercises jurisdiction over wholesale rates before the electricity reaches the local distribution facility and therefore "[w]hat [the utility] does or fails to do is only after the incidence of federal regulation and can in no way frustrate it." But denial of FERC jurisdiction to regulate interstate wholesale transactions merely because they are described in terms of the output of a particular generating facility would have quite different effects, substantially frustrating important policies of the Act. Indeed, petitioners' view would permit companies engaging in interstate commerce to avoid federal regulation altogether by forming a generation-only subsidiary to engage in the wholesale sales to them. The court of appeals correctly rejected this illogical reading of the congressional design.

the costs and output from all of the system's generating capacity, and AP&L participated in the system decision to build Grand Gulf 1. Indeed, under the original plan, AP&L would have been responsible for 17.1% of Grand Gulf costs (see Pet. App. 398a) and, as FERC found (*id.* at 170a), AP&L still remains financially obligated to creditors for that amount in the event that the other operating companies fail to meet their obligations. FERC specifically rejected AP&L's claim that Grand Gulf "was planned only for the other operating companies" and FERC instead found that "AP&L has been continuously involved in the system decisions regarding Grand Gulf and MSE" (*id.* at 169a-170a; see *id.* at 397a-398a, 427a-428a). The Commission and the court of appeals concluded (*id.* at 43a-44a (footnote omitted) (quoting *id.* at 169a)) correctly that " 'the issue here is not whether a company should be forced to purchase or sell power, but rather is the appropriate allocation of costs among integrated companies owned by the same parent.' "[15]

As the court of appeals said (Pet. App. 44a), "[a] consistent line of judicial precedent" supports the Commission's assertion of jurisdiction in these circumstances. This Court's decision in *Pennsylvania Water & Power Co.* v. *FPC*, 343 U.S. 414 (1952), is most directly on point. There, the Court upheld the Commission's authority to require two unaffiliated utilities to continue their long-standing integrated activities, holding that integration was a "practice" affecting wholesale rates, and that the Commission could, therefore, require the utilities to "continue to *buy*, sell, and transmit power in the same coordinated manner

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[15] Contrary to petitioner Reynolds Metals' apparent assumption (87-469 Pet. 16), AP&L was *not* a nonparty to the allocation; it was a party (to both the 1982 System Agreement and the UPSA) that received an allocation of 0%. The Commission's jurisdiction is just as clear as it would be if AP&L had originally been allocated some positive percentage that the Commission found to be unduly low.

in which [they] have been functioning * * *" (343 U.S. at 421 (emphasis added)).[16] Of course, the basis for Commission jurisdiction is even stronger in this case, because here FERC is regulating the interstate activities of affiliated members of a public utility holding company established (and given permission under the Public Utility Holding Company Act) to operate on a regional, integrated basis (see Pet. App. 46a).

Finally, petitioner Reynolds Metals' related assertion (87-469 Pet. 15) that the Commission lacks jurisdiction because Section 201(b) extends only to wholesale *sales*, not *purchases*, also fails. Section 201(b) is not so narrowly drawn and the Commission frequently approves provisions for a seller's wholesale rates that, in effect, limit the options of a purchaser.[17] Petitioners' reliance (87-469 Pet. 15) on this Court's decision in *Nantahala* for the contrary view is misplaced. The Court's arguendo assumption in *Nantahala*, slip op. 19—that "a particular *quantity* of power procured by a utility from a particular source could be deemed unreasonably excessive [by the state commission in setting retail rates] if lower-cost power is available elsewhere, even though the higher-cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, *price*"—does not bear on this case at all. This is not a case of the kind there envisioned, where a utility

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[16] Petitioners' attempt to distinguish *Pennsylvania Water & Power* is unpersuasive. Contrary to petitioners' claim (86-1424 Pet. 6-7; 87-469 Pet. 26-27), the Court's decision in that case did not turn on the narrow circumstance that the Commission was simply enforcing a pre-existing contractual arrangement or merely requiring compliance with an outstanding Commission order. As described by the court of appeals (Pet. App. 45a n.77), the Court relied, more broadly, on the Commission's authority under Section 206. See 343 U.S. at 422-423.

[17] See, *e.g.*, *Kentucky Utilities Co.* v. *FERC*, 766 F.2d 239, 240-241 (6th Cir. 1985) (cancellation notice periods); cf. *Wisconsin Gas. Co.* v. *FERC*, 770 F.2d 1144, 1150 (D.C. Cir. 1985), cert. denied, 476 U.S. 1114 (1986) (minimum commodity bills) (FERC implementation of similar provision of Natural Gas Act).

purchases power from an affiliate at a FERC-approved *price* while "lower-cost power is available *elsewhere*" (*ibid.* (emphasis added)). Rather, this is a case like *Nantahala* itself, where all of the relevant sources of power, some of which are more expensive than others, are within the utility system and the sole question—one that only FERC can fairly resolve—is how the benefits and burdens of those sources should be shared among affiliated companies doing business in different states. In these circumstances, FERC must determine both the price and the quantity, as it has done in its allocation of Grand Gulf capacity.[18]

4. Petitioners' final claims that the court of appeals' decision will create an undesirable "regulatory gap" (86-1380 Pet. 10-15), will preclude an "entirely workable" scheme of state regulation (87-469 Pet. 27-28), and is contrary to the Public Utility Holding Company Act of 1935, 15 U.S.C. 79 *et seq.* (86-1380 Pet. 21-22; 87-469 Pet. 25 n.27), also warrant no further review.

First, no "regulatory gap" is created by the court of appeals' decision. Contrary to petitioner Arkansas Public Service Commission's assertion (86-1380 Pet. 13-15), FERC had the power to consider a claim—had one been made—that Grand Gulf 1 was an imprudent investment whose costs should be borne in whole or part by MSU stockholders rather than by the operating companies' ratepayers, and that MSE should therefore not be permitted to charge the operating companies 100% of the

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[18] Petitioners likewise err in claiming (86-1380 Pet. 6; 87-469 Pet. 21) that FERC's allocation has forced AP&L to share the benefits of its relatively inexpensive coal and nuclear generation capacity with the other three operating companies. As the court of appeals found (Pet. App. 53a n.93), this argument is "fallacious" because "[t]he reallocation of Grand Gulf simply adjusts AP&L's share of MSU's generation capacity costs—costs incurred jointly by the system." See also *id.* at 75a.

costs. But none of the parties, including those from Arkansas, made that argument to FERC.[19]

It is petitioners' crabbed view of the Commission's jurisdiction that would threaten to create a regulatory gap, in which no authority, state or federal, would have power to regulate important aspects of interstate arrangements for the wholesale sale of power. As this Court observed in *Arkansas Electric Cooperative Corp.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 378-379 (1983), Congress adopted Part II of the Federal Power Act to provide federal authority to fill the regulatory gap created by the holding in *Public Utilities Comm'n* v. *Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), that states had no authority to regulate interstate wholesale electric rates. Without attempting to explore precisely the limits of state authority (in the absence of federal jurisdiction) over the present complex arrangements, it is at least highly likely that the states could not, either effectively or constitutionally, regulate the allocation of costs among the four utilities operating in four states of the MSU system. Indeed, each of the affected jurisdictions has sought to deflect the financial liability for the joint Grand Gulf enterprise onto the citizens of its neighboring states (see 87-469 Pet. 28 & n.33). As explained by the court of appeals (Pet. App. 51a-52a (footnote omitted) (quoting *id.* at 312a)), this is the sort of situation for which Congress concluded that FERC would be " 'in the best position to reach the most equitable result and to act in the public interest,

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[19] FERC found (Pet. App. 183a-195a), moreover, that Grand Gulf 1 was part of a reasonable system plan to diversify the fuel base by developing nuclear power to meet anticipated growth in demand. FERC also explicitly affirmed and adopted (*id.* at 190a-191a, 216a) the findings and conclusions of its administrative law judge who determined that MSU's decisions both to begin and to complete construction of Grand Gulf 1 were prudent (see *id.* at 426a).

rather than to be controlled by the necessarily parochial concerns of the States.' "[20]

For this reason, petitioners' suggestion that FERC's assertion of jurisdiction is inconsistent with the Public Utility Holding Company Act of 1935 is also without merit. To be sure, that law sought to eliminate or simplify holding company systems to make the component utilities more amenable to state regulation. But it also specifically authorized the Securities and Exchange Commission to allow a holding company system to continue to exist upon a finding that a "single integrated public-utility system" can best serve a particular geographical region (see 15 U.S.C. 79k(b)(1), 79b(a)(29)). Congress placed such systems under comprehensive federal control because their activities "extending over many States are not susceptible of effective control by any State" (15 U.S.C. 79a(a)). The MSU system operates within that framework, and petitioners' claim that the court of appeals' decision is somehow inconsistent with the Public Utility Holding Company Act is wholly mistaken. See *Northern States Power Co.* v. *Minnesota Public Utilities Comm'n*, 344 N.W.2d. 374, 382 n.17 (Minn.), cert. denied, 467 U.S. 1256 (1984).[21]

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[20] Petitioners are mistaken in arguing (86-1380 Pet. 14; 87-469 Pet. 15 n.14, 21 n.21) that prior Commission decisions endorse the principle of state review of prudence in these circumstances. The Commission has carefully qualified that principle in cases, such as this one, involving affiliates. See *Kentucky Power Co.*, 38 F.E.R.C. ¶ 61,243, at 61,822-61,824 (1987), petition for review pending, No. 87-3643 (6th Cir.).

[21] In a related case, *Mississippi Power & Light Co.* v. *State of Mississippi*, No. 86-1970, the Court recently postponed consideration of jurisdiction to the hearing of the case on the merits. We do not, however, share petitioners' view (86-1380 Supp. Br. 3-4; 87-469 Pet. 28-29) that the Court should for that reason grant review in this case and either decide this case before deciding *Mississippi Power & Light*, or decide the two cases "in tandem." The issues presented in the two cases are entirely distinct, and the decision below in the present case is

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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NOVEMBER 1987

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in keeping with all relevant precedent and plainly correct. FERC's order in the present case is indeed a premise of the dispute in *Mississippi Power & Light*, but unwarranted prolongation of the meritless challenge to FERC's jurisdiction here will only complicate resolution of that dispute.

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No. 87-469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

REYNOLDS METALS COMPANY,
ASSOCIATED INDUSTRIES OF ARKANSAS,
RICELAND FOODS, INC., AND WEYERHAEUSER COMPANY,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

No one disputes the enormous practical and legal importance of the issues presented. For the parties, this case raises the immediate question whether FERC may "reallocate" the capacity of the $3 billion Grand Gulf nuclear plant among four electric utilities serving millions of customers in four states. For Arkansas ratepayers in particular, this case will determine whether FERC may drastically alter that State's economy, and override the authority of the Arkansas Public Service Commission ("Arkansas PSC"), by forcing Arkansas Power & Light Co. ("AP&L") to become a purchaser of unneeded capacity from that "catastrophically uneconomical" facility. (App. 7a.)

The legal issues presented are far-reaching. Whether FERC may divest the States of their traditional regulatory authority over the generation facilities and wholesale purchases of electric utilities that are part of an integrated system has enormous consequences. Such utilities account for more than half of the nation's generating capacity. (Petition of Reynolds Metals Co., *et al.* ["Ark. Ind. Pet."] at 12 n.10.)

Review by this Court is warranted. FERC has recognized from the outset that this case presents "extremely difficult and controversial cost allocation issues which have no easy answers" (App. 145a). The reasoning of the court of appeals cannot stand up to examination and respondents' attempt to support it does not succeed.

1. After we filed our petition, the Court decided to hear *Mississippi Power & Light Co.* v. *Mississippi*, No. 86-1970, *jurisdiction postponed*, 56 U.S.L.W. 3242 (U.S. 1987). The question presented in *Mississippi Power & Light* is whether a State regulatory commission must increase an electric utility's retail rates to reflect the FERC-ordered "reallocation" of Grand Gulf capacity challenged in this case, even if the State commission has not

determined that the Grand Gulf costs were prudently incurred.[1]

We suggested that this case be heard in tandem with *Mississippi Power & Light*. FERC argues, however, that the cases present "entirely distinct" issues. FERC Br. at 22 n.21. To the contrary, both cases involve the proper delineation of federal and State jurisdiction over electric utilities; both cases involve disputes concerning the proper interpretation to be given to the Court's recent decision in *Nantahala Power & Light Co.* v. *Thornburg*, 106 S. Ct. 2349 (1986); and as even FERC concedes, the underlying validity of the FERC "reallocation" order challenged in this case is a "premise" of the dispute in *Mississippi Power & Light*. FERC Br. at 23 n.21. Indeed, whether FERC has statutory authority to "reallocate" the capacity of the Grand Gulf generation facility is, by any measure, far more significant than the subsidiary question, posed in *Mississippi Power & Light*, concerning the precise manner in which the States are to set retail rates in light of FERC's order.

2. Respondents ignore the States' substantial role in regulating the individual MSU operating companies' generation facilities and wholesale purchases.[2] Instead, they

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[1] The Eighth Circuit, addressing a related issue, recently held that the Missouri Public Service Commission is not required to increase AP&L's retail rates immediately to reflect FERC's "reallocation" of Grand Gulf capacity, but rather may do so in accordance with the normal suspension and investigation procedures used by that State commission. *Arkansas Power & Light Co* v. *Missouri Public Service Comm'n*, 829 F.2d 697 (8th Cir. 1987).

[2] The MSU Operating Committee did not have the authority to direct any MSU operating company to construct a generation facility unless such construction was authorized under the laws of the State where the facility was to be built. In Arkansas, for example, the Arkansas PSC is required to approve AP&L's construction of generation facilities and AP&L's transactions involving the purchase of generating capacity. (Ark. Ind. Pet. at 5 n.4, 27 n.31.)

emphasize the highly integrated nature of the MSU system and AP&L's claimed participation "in the system decision to build Grand Gulf 1." FERC Br. at 18. But that has nothing to do with FERC's jurisdiction under the Federal Power Act. The Act carefully delineates federal and State jurisdiction over specific facilities and transactions, with the States having the preeminent role.[3] (Ark. Ind. Pet. at 14.) Under the Act, the regulatory jurisdiction of a State over an electric utility's facilities and transactions is neither diminished nor expanded by the fact of the utility's integration or affiliation with utilities elsewhere.[4]

We have previously shown that the Act specifically withheld from FERC, and reserved to the States, regulatory authority over utilities' generation facilities and wholesale purchases.[5] No exception was provided for "integrated" utilities. Respondents not only ignore this fundamental proposition, but also totally disregard the Act's firm declaration that "Federal regulation [is] to

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[3] The Act was "'conceived entirely as a supplement to, and not as a substitute for, State regulation.'" *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U.S. 515, 525 (1945).

[4] The Public Utility Holding Company Act similarly was not intended to diminish State authority over the utility subsidiaries of holding companies. (Ark. Ind. Pet. at 25.) Indeed, when the Securities and Exchange Commission determined that MSU met the statutory standards for holding companies, it found that the system "is not so large as to impair the effectiveness of regulation in any of the states in which the company operates." *In the Matter of Middle South Utilities, Inc.*, [1952-56 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 76,219, at 79,105 (1953).

[5] Section 201(b)(1) of the Act provides that FERC shall not have jurisdiction "over facilities used for the generation of electric energy" except as "specifically provided" elsewhere in the Act. 16 U.S.C. § 824(b)(1). Similarly, FERC's authority over wholesale transactions in Section 201(b)(1) extends only to "sales" and not to purchases. (Ark. Ind. Pet. at 14-15.)

extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a).[6]

FERC displays its indifference to the interests and regulatory powers of the States when it contends that FERC alone must be empowered to decide how the capacity of a generation facility serving utilities in several States is to be allocated, since the States could in no event coordinate that decision among themselves in an effective manner. This contention is incorrect. We explained in our petition (at 27-28) that the States, without infringing on FERC's jurisdiction over wholesale rates, can readily accomplish such an allocation either by the convening of joint federal and State boards, as Section 209 of the Act provides, 16 U.S.C. § 824h, or by requiring prior State approvals of a utility's wholesale purchases from out-of-state generating facilities. FERC acknowledges the argument (FERC Br. at 20) but offers no response. Although FERC may think it inefficient for the States to determine the degree to which their utilities purchase capacity of facilities such as Grand Gulf, Congress plainly did not share that view and rejected proposals to establish "regional" regulation of generation facilities. S. Rep. No. 621, 74th Cong., 1st Sess. 48 (1935). (*See* note 12, *infra*.)

3. When FERC does address the specific language of the Federal Power Act and the prior decisions of this Court, it adopts a strained interpretation characteristic of an agency that has overstepped its proper bounds.

Consider, for example, the stress FERC places on the language of Section 206(a) of the Act, which describes FERC's remedial power with respect to contracts "affecting" wholesale rates. 16 U.S.C. § 824e(a). Even FERC

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[6] One of the respondents would relegate the States to the role of intervenors in FERC proceedings, thus transforming their function from one of regulating to one of litigating. (SERI Br. at 22.)

acknowledges that this Section cannot be construed as authorizing FERC to alter *any* contract "affecting" a utility's costs, and hence its rates. Such an interpretation would allow FERC to supplant State regulation over matters, such as contracts for the construction of generation facilities, that are undoubtedly beyond FERC's regulatory domain. (FERC Br. at 12.) To cure the untenable consequences of its argument, FERC therefore invents two limitations on its Section 206(a) remedial powers. That Section, it argues, only permits FERC to alter contracts, like the Unit Power Sales Agreement ("UPSA"), that allegedly "affect" (i) intercompany transactions or (ii) the allocation of commonly-incurred costs between two utilities.[7] (FERC Br. at 13-14.)

FERC's argument, custom-tailored for this case, was not relied upon by the court below, has never been adopted by any other court, and has no support in the legislative history of the Act. As this Court has held, FERC may not invoke Section 206(a) to impose a remedy that "invade[s] a nonjurisdictional area"; FERC's remedial authority under Section 206(a) extends only to matters independently within its jurisdiction. *Federal Power Commission* v. *Conway Corp.*, 426 U.S. 271, 279

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[7] In fact, the UPSA did not determine the rates for wholesale power transactions between AP&L and the other MSU operating companies, but rather determined only the share of Grand Gulf's capacity and costs to be allocated to the three MSU operating companies other than AP&L. While FERC contends that the UPSA indirectly "affects" payments made between AP&L and other MSU operating companies under the System Agreement (FERC Br. at 13), it has not demonstrated that the indirect impact, if there is one, is other than *de minimis*. Moreover, FERC's theory would enable it to exercise plenary authority over every generation-related action taken by a utility that participates in a pooling arrangement, thus destroying the "generation facility" restriction that Congress built into Section 201(b)(1) of the Act. (*See* pp. 7-8, *infra*.)

(1976).[8] As we have explained, the "reallocation" order exceeded FERC's remedial authority because FERC has no statutory jurisdiction over generation facilities or wholesale purchases.[9] (*See* Ark. Ind. Pet. at 14-15.)

FERC is also wrong in suggesting that the Court's decision in *Nantahala* supports its interpretation of Section 206. (FERC Br. at 14.) The Court never mentioned Section 206 in *Nantahala* for the quite apparent reason that it was not reviewing the propriety of any FERC order or exercise of jurisdiction. Rather, the Court decided only that a State regulatory body, when setting retail rates, may not collaterally attack a FERC order governing the determination of wholesale rates.[10] (Ark.

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[8] *Conway* makes clear that Section 206(a) does not permit FERC to adjust contract terms that govern matters beyond its jurisdiction simply because such contract terms may "affect" wholesale rates. In *Conway*, the Court first held that Section 206(a) did not allow the Federal Power Commission (FERC's predecessor) to order a utility to increase its (nonjurisdictional) retail rates in order to remedy a discriminatory wholesale rate, 426 U.S. at 276-77, but then proceeded to hold that the Commission could consider such retail rates when exercising its power under Section 206(a) to adjust unreasonable wholesale rates. 426 U.S. at 280. In attempting to distinguish *Conway* (FERC Br. at 16 n.13), FERC completely ignores the first and crucial part of the Court's holding.

[9] The Court explained in *Connecticut Light & Power*, *supra*, that FERC's "jurisdiction does not depend on some independent application of the [Act's] regulatory provisions." 324 U.S. at 528. FERC therefore "get[s] the cart before the horse" (*id.*) in arguing here that a regulatory provision such as Section 206 can confer jurisdiction on FERC beyond that authorized in Section 201 of the Act.

[10] It is difficult to discern how the passage from *Nantahala* relied upon by FERC bears any relation to this case. (FERC Br. at 14.) In observing in *Nantahala* that a FERC allocation of low-cost power would "affect" a utility's costs and wholesale rates, 106 S. Ct. at 2359, the Court was simply addressing the question whether a State regulatory body was precluded under the filed-rate doctrine from utilizing a different allocation in setting retail rates.

Ind. Pet. at 19-21.) One of the respondents acknowledges that "[t]his proposition is not at issue in this case." SERI Br. at 23.

4. FERC and the other respondents contend that the "generation facility" restriction on FERC's jurisdiction, contained in Section 201(b)(1) of the Act, does not apply here because that restriction is qualified by the phrase "except as specifically provided." FERC claims that its supposed remedial authority under Section 206 to adjust contracts "affecting" rates is such a "specific" exception allowing FERC to regulate the Grand Gulf generation facility through its "reallocation" order. (FERC Br. at 15.)

This interpretation of the "generation facility" restriction conflicts with a common-sense reading of the Act's language. When Congress permitted FERC to exercise jurisdiction over "generation facilities" only where "specifically provided," it was referring to the several *specific* references elsewhere in the Act to generation facilities,[11] and did not intend to create an exception that engulfs the general rule. The legislative history of the Act further indicates that the extremely narrow jurisdiction given to FERC over "generation facilities" was not intended to allow FERC to regulate generation facilities on a regional basis, as it unabashedly seeks to do here, since Congress expressly rejected such regional regulation when enacting the "generation facility" restriction.[12] As against this,

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[11] We listed several such statutory provisions in our petition (Ark. Ind. Pet. at 22 n.23), and none of them have anything to do with this case.

[12] As noted in our petition (Ark. Ind. Pet. at 15), Congress rejected the Senate's original view that federal jurisdiction over generation facilities was needed "to secure the planned coordination of this industry on a regional scale." S. Rep. No. 621, 74th Cong., 1st Sess. 48 (1935).

respondents offer nothing.[13]

Although the court of appeals candidly acknowledged that FERC's "reallocation" order did result "to some extent" in the regulation of generation (App. 40a), FERC now suggests otherwise, arguing that the "generation facility" restriction only precludes FERC from regulating matters such as the "size, type, location, and operation" of generation facilities. FERC Br. at 15. FERC offers no support for this reading of the statute, which illogically would preclude FERC from regulating details of generation-facility planning while allowing it to take the far more intrusive step of "equalizing" the capacity costs of numerous generation facilities individually owned by four utilities. The drastic and direct impact of FERC's order on generation facilities is undeniable. FERC has foisted on AP&L unneeded and expensive capacity of the Grand Gulf generation facility, and at the same time has forced AP&L to share with other utilities the economical power generated by its own plants and certificated by the Arkansas PSC to meet Arkansas needs.[14]

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[13] FERC attempts to distinguish *Connecticut Light & Power, supra*, on the ground that it involved the "local distribution facility" restriction to FERC's jurisdiction rather than the "generation facility" restriction. The City of New Orleans finds it necessary in its brief (at 12) to stress the undisputed fact that Grand Gulf is not a "local distribution facility." The clear teaching of *Connecticut Light & Power*, however, is that the various restrictions on FERC jurisdiction in the Act that were intended to preserve State regulation—including the "generation facility" restriction—may not be nullified at FERC's whim because a nonjurisdictional matter may affect interstate commerce in some manner. As the Court explained, Congress "sometimes is moved to respect state rights and local institutions even when some degree of efficiency of a Federal plan is thereby sacrificed," and Congress did so in the Federal Power Act. 324 U.S. at 530. (*See* Ark. Ind. Pet. at 22-23).

[14] Although FERC labels as "fallacious" the contention that AP&L will be forced to share the benefits of its economical plants with the

5. FERC, like the court below (App. 44a n.75), does not dispute that it has no jurisdiction under the Federal Power Act to force purchases of wholesale power.[15] (Ark. Ind. Pet. at 15-16.) Instead, FERC takes refuge in the semantic claim that it has simply "allocated" costs among affiliated utilities, which it claims the authority to do because AP&L should not "be treated as if it were a stranger to the system." FERC Br. at 17.

FERC's position, if sustained, means that FERC may order any utility having a utility-affiliate to increase its total quantity of generating capacity and wholesale power—regardless of whether it needs such capacity or power—through a forced purchase from the affiliate. Nothing in the Act's language supports this startling proposition, which would totally emasculate the States' ability to regulate a utility's aggregate generation plant (and thus its total costs).

Similarly, FERC's proposition finds no support in this Court's decisions. As we have discussed, in *Nantahala* the Court assumed, without deciding, that "the particular *quantity* of power procured by a utility from a particular source" was a matter for State regulation. 106 S. Ct. at 2360 (emphasis in original).[16] The Court's assumption was

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other MSU operating companies (FERC Br. at 20 n.18), it does not dispute that this is the actual economic effect of the cost-equalization required by its "reallocation" order. Moreover, it must be kept in mind that FERC used Grand Gulf as the vehicle to "reallocate" the costs of *four* nuclear units owned by the individual MSU operating companies.

[15] FERC carefully skirts such a contention in asserting that it "frequently approves provisions for a seller's wholesale rates that, in effect, limit the options of a purchaser." FERC Br. at 19.

[16] Although FERC urges that *Nantahala* did not involve a question whether a utility procured an excessive quantity of wholesale power (FERC Br. at 19), it was precisely the absence of such a question that made it unnecessary for the Court to explore the full scope of State jurisdiction over the quantity of wholesale power purchased by utilities.

fully consistent with traditional State regulation of utilities' wholesale power purchases. (*See* Ark. Ind. Pet. at 13 n.12, 28 n.32.)

For the opposite view, FERC relies on *Pennsylvania Water & Power Co.* v. *FPC*, 343 U.S. 414 (1952). In that case, a utility was ordered to continue receiving and selling power pursuant to an existing Federal Power Commission rate-schedule in order to prevent the utility from frustrating a prior order of the Commission. (*See* Ark. Ind. Pet. at 26-27.) No issue was raised in *Pennsylvania Water & Power* concerning the scope of FERC's jurisdiction over wholesale purchases. The Court clearly did not address (let alone sanction) any FERC order, such as that challenged here, that would force one utility to increase its total supply of wholesale power and thereby prevent the State regulatory authority from exercising any effective control over the utility's wholesale power costs.

CONCLUSION

For the reasons stated above and in our Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Nos. 86-1380, 86-1424 and 87-469

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARKANSAS PUBLIC SERVICE COMMISSION, *et al.*,
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v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ARKANSAS POWER & LIGHT COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
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REYNOLDS METALS COMPANY, *et al.*,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF ON BEHALF OF THE ARKANSAS PUBLIC SERVICE COMMISSION, THE STATE OF ARKANSAS, THE ARKANSAS-MISSOURI CONGRESSIONAL DELEGATION AND THE MISSOURI PUBLIC SERVICE COMMISSION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Those opposing the Petitions for a Writ of Certiorari do not claim that the issues raised are unimportant. They do not deny that the case involves four states, billions of dollars, and a fundamental interpretation of the Federal Power Act and its impact on the continued effectiveness of State regulatory authority. Although some parties claim that the jurisdictional issue herein is unrelated to that raised in *Mississippi Power and Light Co.* v. *State of Mississippi*, No. 86-1970, *jur. postponed*, 108 S.Ct. 63 (1987), a case pending before this Court, the Federal Energy Regulatory Commission ("FERC") admits that the "FERC's order in the present case is indeed a premise of the dispute in *Mississippi Power & Light.*" Brief for the FERC in Opposition at 21. Rather, the opposing parties oppose the granting of the Petitions for a Writ of Certiorari based merely upon their view of the merits of the case. In fact, the law supports the contentions of the Arkansas-Missouri Parties.[1]

THE FERC CANNOT REGULATE NON-JURISDICTIONAL MATTERS

Opposing parties claim that the FERC has obvious jurisdiction to reallocate the amount of power from the Grand Gulf nuclear powerplant ("Grand Gulf") based on a simplistic analysis. First, they claim that the contracts in question[2] are jurisdictional, a fact which the Arkansas-Missouri Parties do not dispute.[3] Second, they

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[1] Those submitting the instant brief, identified herein as the "Arkansas-Missouri Parties", are the Arkansas Public Service Commission ("APSC"), the State of Arkansas, the Arkansas-Missouri Congressional Delegation, and the Missouri Public Service Commission ("MoPSC").

[2] The contracts in question are the Unit Power Sales Agreement ("UPSA") and the 1982 System Agreement.

[3] This recognition of jurisdiction distinguishes the instant case from cases cited by opposing parties, such as State of Minnesota v. FERC, 734 F.2d 1286 (8th Cir. 1984) and South Dakota Public Utilities Comm'n v. FERC, 690 F.2d 674 (8th Cir. 1982), in which FERC jurisdiction over a pooling agreement was challenged.

claim that the entities which filed the contracts in question are "public utilities" and thereby jurisdictional, a fact that the Arkansas-Missouri Parties do not dispute. Third, they claim that all matters within a jurisdictional contract filed by a jurisdictional entity are subject to modification by the FERC. This last contention forms the core of the dispute.

A contract is jurisdictional if it includes any matter subject to FERC jurisdiction. Such jurisdictional contracts, however, may include nonjurisdictional matters. Consider, for example a contract which provides for both the sale of electricity for resale and a sale of a block of football tickets. Merely because the FERC has jurisdiction over the sale of electricity does not expand its jurisdiction to cover the appropriate price of football tickets, albeit that both matters are governed by the same contract.

Similarly, the UPSA includes both jurisdictional and nonjurisdictional matters. The FERC has the right and the obligation to determine the appropriate rate for a wholesale sale of power, as provided in the UPSA. It does not have jurisdiction, however, to reallocate the amount of power that each signatory to the UPSA purchases from Grand Gulf.[4]

The FERC lacks jurisdiction to reallocate the output of Grand Gulf because of the prohibition against FERC jurisdiction over generating facilities in Section 201 of the Federal Power Act, 16 U.S.C. § 824 (1982), and, independently, because of the lack of FERC authority to regulate purchases of electric power.

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[4] No party hereto has cited any case other than the decision below in which a court upheld the reallocation by FERC of the amount of power produced by an electric generating unit. Municipalities of Groton v. FERC, 587 F.2d 1296 (D.C. Cir. 1978), Mid-Tex Electric Co-op, Inc. v. FERC, 773 F.2d 327 (D.C. Cir. 1985), and South Dakota Public Utilities Comm'n v. FERC, 690 F.2d 674 (8th Cir. 1982), ostensibly cited for this proposition, do not involve an alteration of the amount of generating capacity purchased or sold.

THE FERC LACKS AUTHORITY TO REALLOCATE THE OUTPUT OF GENERATING FACILITIES

The nature of the prohibition in Section 201 of the Federal Power Act against FERC jurisdiction over generating facilities becomes apparent upon an analysis of the methods of ownership of generating facilities. In the electric utility industry, there are a number of ways of acquiring the benefits of ownership of a generating unit. First, and most simply, a utility may own a generating unit to be used solely for its own benefit. Second, a generating unit may be jointly owned by more than one utility. Third, one utility may sell the output of a generating unit to other utilities by means of a unit power sale. Through such unit power sale, the purchasing utilities essentially pay the entire cost of their share of the generating facility. Such assumption of obligations has been deemed to constitute the equivalent of a sale and purchase of generating facilities. *See Otter Tail Power Company v. Federal Power Comm'n*, 473 F.2d 1253 (8th Cir. 1973).

If a utility constructs a generating facility for its own use or if utilities jointly own a generating facility, the FERC cannot reallocate the output of the facility, because there is no jurisdictional transaction. If a utility purchases the output of a generating facility by means of a unit sale, FERC jurisdiction over the contract and the rates pursuant thereto does attach. This form of ownership does not, however, give the FERC greater jurisdiction over the amount of generating capacity sold to participants than would the other two forms of ownership.

In the instant case, the FERC not only altered the allocation of the facility subject to the UPSA, Grand Gulf, it used the UPSA to assert jurisdiction over non-jurisdictional facilities. Even the FERC must admit that it has no jurisdiction to reallocate the Waterford

nuclear powerplant ("Waterford"), owned solely by Louisiana Power & Light Company ("LP&L") or the ANO plants, owned solely by Arkansas Power & Light Company ("AP&L"). FERC, in improperly expanding its jurisdiction, utilized Grand Gulf, as a surrogate, to reallocate electric output based upon the amount of Waterford owned by LP&L and the amount of ANO owned by AP&L, as well as Grand Gulf ownership, thus, essentially, reallocating Waterford and ANO.[5]

Opposing parties herein suggest that the FERC has jurisdiction to reallocate the output of Grand Gulf either because the exemption in Section 201 is inapplicable to a sale of power at wholesale or because Sections 205 and 206 of the Federal Power Act, 16 U.S.C. §§ 824d and 824e (1982), "specifically provide" for jurisdiction over generating facilities, as contemplated within Section 201(b) of the Act, 16 U.S.C. § 824(b)(1) (1982).

This Court in *Connecticut Light & Power Co. v. F.P.C.*, 324 U.S. 515 (1945), specifically rejected the contention that a facility is jurisdictional even if subject to the exemption in Section 201(b)(1) "where the Act provides for their regulation." *See* 324 U.S. at 528. This Court stated that such an interpretation:

> [S]eems to get the cart before the horse, for whether the Act provides for such regulation depends on whether the facilities are under the jurisdiction of the Commission; the Commission's jurisdiction does not depend on some independent application of the regulatory provisions.

Id. This statement constitutes a specific rejection of the ruling in *Hartford Electric Light Co. v. Federal Power Comm'n*, 131 F.2d 953 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943), a case on which several

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[5] The Louisiana Consumers apparently view this case as an allocation of both Grand Gulf and Waterford. *See* (Louisiana Consumers) Brief in Opposition at 5, 15.

parties to this proceeding rely as authority for the proposition that generating facilities used for wholesale sales are subject to FERC jurisdiction.[3]

THE FERC CANNOT FORCE A PURCHASE OF POWER

Although the FERC has no authority over purchases of electricity and cannot force such purchases, utilities may voluntarily agree to purchase power. To constitute a forced purchase, it is elemental that a FERC order to that effect must issue. Thus, contrary to the position of the Louisiana Parties,[7] the Arkansas-Missouri Parties had no grounds to complain regarding the so-called "up-front costs" of White Bluff 1 and 2. Those payments were made in accordance with a contract among private parties, not in accordance with a reallocation order by the FERC. Similarly, contrary to the contention of opposing parties herein, the FERC never ordered the purchase of electric power in the case leading to *Pennsylvania Water & Power Co. v. Federal Power Comm'n*, 343 U.S. 414 (1952). Rather, as articulated in the circuit court decision in that case, the Commission had ordered a rate reduction, ordered the utility to file its rate schedule reflecting such reduction, and assumed the continuation of a pre-existing contract. *See Pennsylvania Water & Power Co. v. Federal Power Comm'n*, 193 F.2d 230, 247 (D.C. Cir. 1951). The circuit court did not order the initiation of a contract to "buy" electricity, as claimed by opposing parties in this proceeding.[8]

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[6] Contrary to the assertions of Louisiana Parties herein, this Court did not *adopt* the findings of *Hartford* in *Connecticut Light & Power*, 324 U.S. at 528, n.6. It merely *recited* such findings.

[7] Brief Opposing Petitions for Certiorari on Behalf of the Louisiana Public Service Commission and State of Louisiana at 17.

[8] Nor did the FERC or the circuit court order the purchase of power in *Central Iowa Power Coop. v. FERC*, 606 F.2d 1156 (D.C. Cir. 1979).

AFFIRMATION OF THE DECISION WOULD IMPROPERLY EXPAND FERC AUTHORITY

Some parties to this proceeding attempt to portray the instant case as a continuation of the traditional exercise of FERC jurisdiction. In fact, the instant case deals with an attempt to expand that jurisdiction improperly and monumentally. The FERC suggested the extent of such expansion in its Brief in Opposition herein, where it claimed that it always has jurisdiction to reform a contract which "allocates a commonly-incurred cost between two utilities." FERC Brief in Opposition at 13.

Prior to the instant case, the FERC had never altered a contract to require some utilities to increase and some to decrease their purchase of power from a generating plant.[9] The FERC attempts to justify its departure from past practice by claiming that the Middle South Utilities ("MSU") system was a highly integrated one and, therefore, apparently subject to being treated as a single, monolithic utility (although the FERC denied treating the MSU system as a monolithic utility).[10] Now, the FERC is claiming it can perform such reallocation among any utilities, whether affiliated or not.

The FERC claims the authority to allocate or reallocate any commonly-incurred costs between two utilities buying and selling power. If this claim is correct, the FERC would have enormous power to alter otherwise nonjurisdictional transactions. Consider, for example, a contract

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[9] Mississippi Industries cites Nantahala Power and Light Co. v. FERC, 727 F.2d 1342, 1348 (4th Cir. 1984), Connecticut Light and Power Co., 55 F.P.C. 1986, 1989 (1976) and Georgia Power Co., 52 F.P.C. 1343, 1349 (1974) as support for the claimed "well recognized FERC authority" to allocate costs on a system-wide basis. *See* Brief for Mississippi Industries in Opposition at 11. The FERC did not alter the utility's cost allocation in any of these cases, and none of these cases resolved the question of whether the FERC has authority to roll-in generation costs.

[10] *See* Appendix at 117a.

for the sale of coal to three electric utilities. Normally, a contract for the sale of coal would not be jurisdictional before the FERC, and such a contract would not be filed. If, however, one of those utilities filed a wholesale rate with the FERC, could the FERC force a reformation of the otherwise nonjurisdictional coal contract? Similarly, consider a unit power sale to three utilities, one of which is a municipality under the Federal Power Act, 16 U.S.C. § 824(f) (1982). Could the FERC force an alteration of unit power purchases, thus either directly or indirectly regulating the amount of power which may be purchased by the otherwise nonjurisdictional municipality?[11] The FERC simply lacks such far-reaching authority to modify such contractual provisions.

THE FERC CANNOT DECIDE ALL PRUDENCE ISSUES

Contrary to suggestions of opposing parties herein, the FERC has limited authority to find imprudence in the instant situation. The FERC could determine whether it was prudent for MSE to construct Grand Gulf rather than constructing an alternative powerplant, constructing a smaller powerplant, purchasing power from other

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[11] This is not to say that the FERC may not find a purchase of coal or of a portion of a powerplant to be imprudent in determining the appropriate cost of service in a wholesale transaction. A determination of imprudence, however, carries a heavier burden than a determination that a transaction is unjust, unreasonable, or unduly discriminatory. A utility has the burden of proof to show rates are just, reasonable and not unduly discriminatory, whereas the prudence of its actions is presumed absent a showing of a significant doubt regarding such prudence. *See* Anaheim, *et al.* v. FERC, 669 F.2d 799, 809 (D.C. Cir. 1981). Prudence must be examined as of the time management made its decision to determine whether its decision was prudent. *See* New England Power Co., 31 FERC (CCH) ¶ 61,047 (1985); Re Union Electric Co., 66 P.U.R. 4th 202, 213 (March 29, 1985). In the instant case, the FERC determined what it considered to be the discriminatory nature of the transaction based upon current circumstances, long after the relevant management decisions were made. *See* Appendix 127a. Its determination did not rest upon the unreasonable activities of management. There was no investigation or finding of imprudence.

sources, or following another alternative. The FERC, in the confines of a wholesale rate case, also could have determined whether the construction of Grand Gulf was conducted in a prudent manner or whether the cost of Grand Gulf would have been less with prudent management. However, the FERC is without authority to decide whether it was prudent for LP&L, Mississippi Power & Light Company or New Orleans Public Service, Inc., to have entered into the contract to purchase Grand Gulf rather than to have purchased an alternative source of power supply. Only the States may make that decision. APSC and MoPSC may be constrained from making a prudence determination regarding AP&L, because AP&L is purchasing a portion of Grand Gulf only as a result of the FERC order which forces it to do so.

As many parties herein have admitted,[12] the individual States could have certified Grand Gulf or determined the prudence of building Grand Gulf or continuing construction of Grand Gulf. The regulatory gap which prevents the States and FERC from determining the prudence of purchase arises only where the FERC has reallocated the output of Grand Gulf, as it has done here.[13]

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[12] There is also a regulatory gap created by the FERC decision, because if the FERC can reallocate individually built plants at will, a State's decision to allow construction of the plant to meet native needs becomes meaningless. Instead, a local utility can have a large amount of excess capacity or inadequate capacity years after a State certification proceeding, for the sole reason that the FERC has forced the utility to increase or decrease its unit power purchases.

[13] The Arkansas-Missouri Parties feel constrained to address the references herein to purported "internecine" litigation. *See* Brief for Mississippi Industries in Opposition at 14; (Louisiana Consumers) Brief in Opposition at 17. Each State Commission has the statutory responsibility to ensure that its ratepayers are not charged unjust, unreasonable, or unduly discriminatory rates. If the Commission reduces unjust, unreasonable, or discriminatory rates, the utility must absorb that reduction. Such State Commission action in no way transfers costs to other jurisdictions. Rather, it assures

CONCLUSION

For the foregoing reasons and for the reasons cited in the Petition for a Writ of Certiorari and in the Supplemental Memorandum filed herein by the Arkansas-Missouri Parties, the Arkansas-Missouri Parties urge this Court to grant the Petition for a Writ of Certiorari.

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responsible management decisions by the involved utilities. If utilities can escape such responsibility by making certain that FERC allocates 100% of a powerplant, no matter how unreasonable the utility decision to make a unit power purchase from that facility, the utility has essentially isolated itself from liability and imposed all risk upon ratepayers. As a result, the utility has no incentive to assure management efficiency, and the underlying purpose of regulation is lost.